

RETHINKING CANADA’S DUTY TO CONSULT DOCTRINE: ACCOMMODATING
ABORIGINAL RIGHTS IN THE DEPLOYMENT OF SMALL MODULAR REACTORS
(SMRs)

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ABSTRACT

In its foundational case law, the Supreme Court of Canada linked the duty to consult and accommodate to the purpose of reconciliation. However, the Canadian legal rules on the duty to consult, as presently structured and developed by case law, do not adequately fulfill that purpose. The Court has also consistently stated that the duty to consult and accommodate does not include an obligation to reach an agreement. This judicial pronouncement appears to provide the government an opportunity to approach consultation processes in a manner that merely seeks to reach the minimal requirements, without requiring an effective and meaningful dialogue. A minimum-requirement approach to consultation and accommodation would leave the protective and reconciliation purpose of section 35 significantly unsatisfied. Aboriginal engagement for future development should embrace a collaborative approach such that the Crown's decisions affecting Aboriginal and treaty rights do not amount to a unilateral exercise of power, but rather, promote the goal of reconciliation with Aboriginal peoples.

Although the jurisprudence in *Haida Nation* creates a useful path for achieving the protective and reconciliation purpose of section 35, it remains the case that without extending the Supreme Court's articulation of the duty to consult process, the fundamental goal of section 35 may actually remain unachieved. This thesis makes this argument using the particular example of the possible development and placement of Small Modular Reactors (SMRs) within the traditional territory of Aboriginal communities. This perspective involves a novel technology as an example of future development, where there is a new opportunity to engage in consultation in better ways than may have occurred with legacy technologies.

Building on the Supreme Court of Canada's cases and academic scholarship, this thesis argues that implementing a standard for consultation that aims at consent would better respect the underlying law on the duty to consult and thereby improve Crown-Aboriginal relations. The thesis makes several recommendations: judicial interpretation that develops factors to assess if consultation has aimed at consent; government co-development of consultation policies and practices with Aboriginal peoples; and improved practices in securing Aboriginal approval through agreements negotiated by project proponents.

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Chapter 1: Introduction and Overview

1.0 Introduction

The duty to consult is an important legal doctrine that seeks to play a key role in reconciling Crown sovereignty with pre-existing Aboriginal claims. However, beyond the initial case law, the jurisprudence seems to be implemented in a manner that is sometimes inconsistent with reconciliation, the overarching purpose of section 35 of the *Constitution Act, 1982*.¹

Over recent years, many Crown-Aboriginal disputes have sprung from project developments concerning Aboriginal peoples' rights and claims to their traditional land. The Supreme Court of Canada developed the duty to consult to guide Crown-Aboriginal relationships in resource development and to resolve issues that may arise in this area, in keeping with section 35, the constitutional provision that protects Aboriginal and treaty rights by "recognizing and affirming" them in section 35(1).²

In its development of the doctrine, the Supreme Court of Canada linked the duty to consult to the purpose of reconciliation.³ The Court stated that the constitutional duty arises as an obligation on the Crown to consult Aboriginal peoples when it contemplates a decision that may potentially adversely affect Aboriginal or treaty rights. The duty to consult stems from section 35, and as such, it should function to achieve the protective purpose of section 35.

In examining the role of reconciliation for the duty to consult, this thesis could make its argument simply by relying upon the Court's moderate, earlier account of reconciliation in the majority decision of Lamer C.J.C. in *R. v. Van der Peet* that interprets the concept as reconciling the assertion of European sovereignty with existing Aboriginal claims.⁴ However, as discussed

¹ *Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11*. Section 35 recognizes and affirms "existing Aboriginal and treaty rights". This short guarantee has generated many cases.

² *Haida Nation v. British Columbia (Minister of Forest)*, 2004 SCC 73 [2004] 3 SCR 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [*Taku River*]; *Mikisew Cree First Nation v. Canada*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew Cree*]. "Aboriginal peoples" is the phrase used collectively when referring to the original peoples of Canada. Out of respect for Indigenous peoplehood, the phrase Aboriginal peoples will be predominantly used throughout this research work, even where the Supreme Court of Canada's terminology might refer to "Aboriginal rights-bearing communities" or "Aboriginal communities". The phrases "Indigenous peoples" and "Aboriginal peoples" may be used interchangeably in specific instances.

³ See generally, *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 SCR 765 at para 61 [*Mikisew Cree*, 2018].

⁴ *R. v. Van der Peet*, [1996] 2 SCR 507 at paras 36, 42 [*Van der Peet*].

later in the thesis, in light of later cases discussing reconciliation, the separate account of reconciliation from McLachlin J. (as she then was) in *Van der Peet*, which emphasizes that equal weight must be placed on the legal perspectives of both Aboriginal and non-Aboriginal societies, should also appropriately inform how the concept is understood.⁵

Although reconciliation is discussed in detail later in this thesis, it is important to state here that the duty to consult is a fundamental aspect of the objective of reconciliation of Aboriginal and non-Aboriginal societies. The Supreme Court of Canada has maintained that section 35(1) is aimed at the reconciliation of Aboriginal and non-Aboriginal societies to achieve a mutually and long-lasting relationship – this involves recognizing Aboriginal and non-Aboriginal viewpoints when the government intends to carry out an action that affect Aboriginal peoples. As this thesis will detail further, according to the case law, section 35 does not guarantee Aboriginal peoples a veto right over a project, and consent is required only in cases that involve established rights. Thus, , the duty to accommodate does not require agreement to be reached. The law thus appears to give the Crown the chance to primarily approach consultation processes just to reach the minimal requirements, without effectively requiring meaningful dialogue.

The discharge of the duty to consult in future development should be treated as a site for ongoing reconciliation between the Crown and Aboriginal peoples rather than a procedural box to be ticked. This thesis argues that making consent the required objective of consultation could encourage diligent approaches to consultation and enable Canada to develop a more inclusive approach toward reconciliation. It suggests further expansion and collaborative development of the duty to consult, as well as improved practices in relation to obtaining Aboriginal approval through negotiated agreements.

This thesis seeks to contribute to the current discussions on the need to expand *Haida Nation*'s jurisprudence in the area of project development in Canada. This thesis argues that although the jurisprudence in *Haida Nation* creates a useful path for fulfilling the purpose of section 35, without expanding the court's articulation of the duty to consult processes, the ultimate goal of section 35 may remain unachieved and the *Haida Nation* principles thus end up disrespected.

⁵ *Ibid.*, at para 35.

The Canadian principle of the duty to consult, as presently structured and developed by case law, is not sufficiently inclusive or protective of Aboriginal peoples' rights. An approach to implementing the duty to consult that requires a minimal duty from the government will leave the protective and reconciliation purpose of section 35 significantly unsatisfied. Consultation processes for future development should encompass a collaborative approach such that the Crown's decisions affecting Aboriginal and treaty rights do not amount to a unilateral exercise of power, but rather promote the goal of reconciliation with Aboriginal peoples. A minimum-requirement approach to consultation and accommodation would not achieve the goals of reconciliation intended by section 35.

Building on the Supreme Court of Canada's cases and academic scholarship, this thesis argues that taking on a standard of consultation aiming at consent would better respect the underlying legal principles and thereby enhance the relationships between the Crown and Aboriginal peoples, and it develops some resulting implications.

This thesis advances its argument in the particular context of the possible deployment of Small Modular Reactors (SMRs) on or near Aboriginal traditional territories. This SMR context is one that involves new technology and a new opportunity to engage in consultation in better ways than may have occurred with legacy technologies. Using this context of a new technology where there is a chance to get things right from the outset, this thesis argues for an improved understanding of the duty to consult that follows the initial purposes the Supreme Court of Canada recognized the duty to consult as having. On the original duty to consult case law, the duty to consult is supposed to promote reconciliation. Later case law has not done so effectively. In other words, the thesis argues that subsequent case law has not followed properly the original case law and must be reordered in light of the underlying principle of reconciliation. Doing so offers a distinctive understanding of the duty to consult that is neither the current understanding of the duty to consult nor a so-called veto (as some assume is the only alternative).

Rather, the thesis will argue, the conception advanced is in line with a better understanding of what Canadian law on the duty to consult requires and with developing international norms. Both of those call for consultation that aims at consent. That does not necessarily mean that all instance of consultation will achieve (or needs to achieve) consent. But consultation aimed at consent is different than consultation as presently conceived (and results in the consideration of

different factors in assessing consultation) even while not amounting to a so-called veto power. This thesis thus tries to suggest a new way of understanding the legally standard for consultation.

1.1 Setting the Background

At the epicentre of certain Crown decisions lies the possibility for the Crown's decision to have potential or actual adverse effects upon Aboriginal rights. For example, as it relates to some resource development projects, Crown decisions are critical to the physical and cultural well-being of Aboriginal peoples. Canada's resource and energy development are often linked to encroachment on Aboriginal rights and interests, as well as Aboriginal resistance to such infringement. This frequently exerts pressure on Crown-Aboriginal relations.

In various circumstances, Aboriginal peoples have claimed that the Crown has not discharged its obligation to consult Aboriginal groups adequately, thereby resulting in a lack of significant attention paid to the Aboriginal rights and/or interests. Over the years, this sort of claim has led to numerous lawsuits against the Crown by Aboriginal peoples; these lawsuits have sought courts' intervention in clarifying the parameters of the duty to consult.⁶ Although litigation sometimes may be necessary, excessive litigation because of ongoing disagreement is likely to mar *reconciliation* processes. Economically, litigation has resulted in major financial losses and disruption of project development for Aboriginal peoples, the government, project proponents, and the Canadian economy.⁷

In its more detailed elaborations, the Supreme Court has defined the government's legal responsibilities in the area of consultation and accommodation of Aboriginal communities. The Crown has the sole responsibility to consult with Aboriginal peoples. The government may, however, delegate aspects of its obligation to industry.⁸ The Court has also specified that accommodation will require balancing the interests of the affected Aboriginal peoples with the

⁶ Bryn Gray, *Building Relationships and Advancing Reconciliation through Meaningful Consultation*, Report to the Minister of Indigenous and Northern Affairs (2016), online: <<https://www.aadnc-aandc.gc.ca/eng/1498765671013/1498765827601#sec1>> (Accessed March 12, 2018) [Gray- INAC Report, 2016].

⁷ *Ibid.*

⁸ *Haida Nation*, *supra* note 2 at para 53.

larger society.⁹ The Supreme Court's fuller detailing of the legal duty appears to set up the government to discharge its obligation merely in a manner that meets the minimum requirements. The government's overly frequent approach of working to achieve minimum standards of consultation and the requirement of balancing Aboriginal interests with the interests of the larger Canadian society together promote a very limited fulfillment of the protective function of section 35.

The Supreme Court's detailed conception of the duty to consult is largely informed by the common law, while factoring out Aboriginal legal principles. It is thus inconsistent with the underlying principle the Court had set out concerning reconciliation. A reconciliation-oriented balancing approach—an approach that draws on Canadian and Aboriginal legal perspectives—will be helpful to formulate a consultation regime for future developments as Canada endeavours to unlock its vast resources.

The context of consultation related to deployment of a new technology, where patterns of conduct are not already established, can help show the possibilities of a return to the underlying principles of the duty to consult, and the thesis uses the example of SMRs for such a context. By way of background, Small Modular Reactors (SMRs) are unique technologies that are expected to supply power to smaller electrical grids or remote off-grid regions in Canada.¹⁰ They are advanced technologies that have unique features and are designed to facilitate power supply in areas where traditional nuclear power plants are not practicable.¹¹ Globally, the call to embrace a clean energy system to reduce fossil fuel emissions is increasing.¹² Canada is increasingly contemplating SMR development to achieve its commitment to clean energy and to reduce

⁹ *Ibid.*, at para 50.

¹⁰ Canada, Canadian Nuclear Safety Commission, *Discussion Paper DIS-16-04, Small Modular Reactors: Regulatory Strategy, Approaches and Challenges*, (Ottawa: CNSC, May 2016) at 1 [*CNSC Discussion Paper*]; N. Todreas, "Small Modular Reactors for Producing Nuclear Energy: An Introduction" in Mario D. Carelli & T. Ingersoll, eds., *Handbook of Small Modular Nuclear Reactors* (Cambridge: Woodhead Publishing, 2015). [*Todreas*].

¹¹ *CNSC Discussion Paper*, *ibid* at 33.

¹² See generally, United Nations, Sustainable Development Goals, *Helping Governments and Stakeholders Make the SDGs a Reality*, online: <<https://sustainabledevelopment.un.org/>> (Accessed November 19, 2019); Canada Nuclear Laboratories, *Canada Releases Summary Report on Small Modular Reactors PFEOI* (October 17, 2017), online: < <http://www.cnl.ca/en/home/news-and-publications/news-releases/2018/cnl-and-cns-launch-international-generation-iv-and.aspx> > retrieved on March 30, 2018.

emissions.¹³ Remote communities in Canada, which have significant Aboriginal populations, are contemplated as possible sites for SMR deployment. However, placement of novel power plants must recognize Aboriginal peoples' rights. It is also important to ensure that past experiences are factored in, "and that there will not be any long-term legacy associated with the project for future generations."¹⁴

There are currently very limited works addressing the impact of SMRs on Aboriginal peoples' rights. In a survey of literature on SMRs, Kevin Hanna et al specifically stated that there is a need for more research in the area of SMRs' impacts on Aboriginal peoples, as Aboriginal peoples have a distinct set of constitutional rights. They wrote:

Research addressing both the positive and negative impacts of [SMRs] on Aboriginal communities is almost entirely lacking. Given that Aboriginal peoples in Canada have a unique set of rights set out in Section 35(1) of the *Constitution Act, 1982*, Canada's status as a signatory of the United Nations Declaration of the Rights of Indigenous Peoples, and the Federal Minister of Indigenous Affairs commitment to implement the declaration (Indigenous and Northern Affairs Canada 2016), this represents an essential area of exploration if [SMRs] are going to be developed for Canada's energy future.¹⁵

While this thesis advances a novel argument about the duty to consult doctrine and how best to understand it, it also responds to the above call. Using SMRs as a particular context of deploying a novel technology where it is possible to get things right from the beginning, the thesis contributes to the ongoing discussion on the possible deployment of SMRs in Canada in relation to Aboriginal rights and the duty to consult. Most of the limited Canadian research on SMRs focuses on safety, energy security, and economics. Impacts on Aboriginal and treaty rights are also a necessary focus for the successful advancement of the new technology.

Much focus on SMR technology relates to offering a cleaner energy source. One area of attention has been remote, off-grid communities, where SMRs offer a substitute for high-cost diesel-fired

¹³ Canadian Parliament, House of Commons, Standing Committee on Natural Resources, *Nuclear Sector at a Crossroads: Fostering Innovation and Energy Security for Canada and the World*, Report of Standing Committee on Natural Resources, 42 Parl., 1st Sess. (June 2017) 12 (Chair: James Maloney) at 12.

¹⁴ SMR Roadmap Technology Working Group, *Canadian SMR Roadmap: Technology Working Group Report* (October 26, 2018) (accessed December 10, 2019) at 18 [SMR Roadmap-TWG]; Indigenous and Public Engagement Working Group, *Canadian Small Modular Reactor Roadmap: Revised Recommendations* (August 17, 2018) (Accessed December 20, 2019) at 2 [SMR Roadmap-IPEWG].

¹⁵ Kevin Hanna et al, "What Is Known About the Impacts of Alternative Energy Development? A Gap Analysis of Impact and Assessment Research for Alternative Energy Development", CEAR Project Report SC-16-1 (Okanagan: The University of British Columbia, 2016) at i, 6 [Hanna et al].

generators.¹⁶ In Canada, such communities are mostly Aboriginal-based or largely populated by Aboriginal groups. While some provinces, including Saskatchewan, have been able to reach all or almost all communities with the electrical grid, others have not. British Columbia has the largest number of communities that depend largely on diesel, with fifty-seven communities primarily operating diesel generators. Ontario accounts for thirty-one communities, while Newfoundland & Labrador, Nunavut, and Quebec account for twenty-six, twenty-five and twenty-four communities respectively.¹⁷ In Nunavut, even Iqaluit, a city of almost ten thousand people, is off-grid and dependent on diesel-generated electricity. These local diesel generators are powered with over 90 million liters of diesel every year, “emitting 240,000 metric tons of CO₂ and several other air contaminants in the process.”¹⁸ SMRs can provide a unique reliable energy supply “as a low greenhouse gas emission alternative for electricity generation.”¹⁹

Their application may extend beyond replacing diesel-generated electricity. For example, while only one off-grid community in Saskatchewan is operated primarily on diesel generators, approximately half of Saskatchewan's energy is powered by coal, a source of energy fuel that involves high emissions.²⁰ SMRs could help Saskatchewan to hit its carbon emission goals, “which would require a 40 [percent] reduction in 2005 emission levels in the next decade.”²¹

However, placement of any novel power plants must recognize Aboriginal rights and interests. SMRs offer unique circumstances that make their development an important opportunity for the Crown to go above and beyond its usual technical approach to the duty to consult. SMRs are still at the conceptual stage. Therefore, they provide a unique opportunity for far earlier forms of engagement with Aboriginal peoples in terms of research partnerships into potential impacts and effects on Aboriginal peoples. Instead of presenting a particular proposal for consultation and

¹⁶ Nuclear Energy Insider, *Holtec, Ukraine plan to build SMRs in 2020s; Canada to publish SMR roadmap in the fall* (March 7, 2018), online: < <https://analysis.nuclearenergyinsider.com/> > (Accessed March 31, 2018) [*NEI-Holtec*].

¹⁷ SMR Roadmap-TWG, *supra* note 14 at 100.

¹⁸ Jorge Morales Pedraza, “Benefits of Small Modular Reactors”, in Jorge Morales Pedraza, *Small Modular Reactors for Electricity Generation: An Economic and Technologically Sound Alternative* (Vienna: Springer, 2017) at 145 [*Pedraza*].

¹⁹ *Ibid.*

²⁰ SMR Roadmap-TWG, *supra* note 14 at 100.

²¹ Jason Warick, CBC News Saskatchewan, *Premier Scott Moe signs agreement with 2 other premiers to develop scalable nuclear technology* (December 2, 2019) [*Premier Scott Moe Signs Agreement*].

accommodation, Aboriginal peoples could be proactively engaged at the research and development stage.

This thesis does not apply to SMRs uniquely. However, they are an interesting example of a future development, which provides an opportunity to reassess and improve the role of the duty to consult in promoting mutual relationships between the Crown and Aboriginal peoples.

1.2 Outline of the Thesis

This thesis is divided into five chapters. The introductory chapter 1 has briefly set up the intended argument. A short appendage to this chapter after the present outline contains a literature review aimed at showing how this thesis will make innovative arguments that contribute to what has already been done.

Chapter 2 very briefly reviews the fundamentals of SMRs and the potential impact of SMRs on Aboriginal peoples. It sets out, in more detail, the potential Aboriginal interests that may be impacted in the course of setting up the nuclear technology and during its operation in the context of Aboriginal peoples in Saskatchewan. These likely impacts include taking up of Aboriginal traditional lands, impacts on water bodies which may restrict Aboriginal peoples from the continuous exercise of their fishing rights, and restrictions of movement in exclusion zones. It shows some of the resulting requirements of the future duty to consult doctrine in the context of a technology presently in ongoing development.

Chapter 3 sets out more fully the background for the duty to consult and accommodate in a broader context and then examines its application in the context of a future development, such as SMRs. It traces the principled origin and the now-legalistic requirements of the duty to consult. This chapter also briefly summarizes the emerging norms of the *UNDRIP* and highlights the Canadian perspective on these international norms.

Chapter 4 discusses at some length the reconciliation case law from the Supreme Court of Canada. It briefly references other theories of reconciliation in order to situate the account of reconciliation in the case law. This thesis adopts the Supreme Court's long-standing account of reconciliation from *Van der Peet* – “the reconciliation of pre-existing Aboriginal societies with

the assertion of Crown sovereignty.”²² This thesis approaches the question of reconciliation in the context of McLachlin J.’s conception expressed in that case and accepted in later cases. Consistent with the view of McLachlin J. (as she then was), this thesis argues that the legal perspectives of both non-Aboriginal and Aboriginal societies “must be incorporated and the common law being applied must give full recognition to the pre-existing [A]boriginal tradition” to achieve reconciliation.²³ This account of reconciliation should continue to influence the duty to consult. Chapter 4 discusses why the current duty to consult does not meet the standards that would flow from reconciliation, thus putting the legalistic form of the duty to consult at odds with its principled origins.

Chapter 5 discusses at some length the international norm of FPIC and why that might have bearing on Canadian duty to consult case law. It discusses how there can be a concept of consultation aiming at consent that differs from the current duty to consult and also differs from an obligation to obtain consent (or what is sometimes called a “veto power”). The chapter explores ways in which the law could further a concept of consultation aiming at consent and the application of such a standard in particular scenarios: judicial development of revised approaches considering factors that seek to assess whether consultation was aimed at consent, seeking to clearly guide improved consultation practices so as to avoid ongoing litigation; government co-development of consultation policies and practices with Aboriginal peoples; and improved practices in securing Aboriginal approval through negotiated agreements.

1.3 Existing Scholarship on the Duty to Consult

Under Canadian law, Aboriginal peoples have a recognized set of rights enshrined in Section 35(1) of the *Constitution Act, 1982*. The duty to consult and accommodate is central to the protection of Aboriginal peoples’ rights in Canada.²⁴ The Crown’s obligation to consult Aboriginal peoples has been viewed by some scholars, notably in the prominent work of Dwight

²² *Mikisew Cree*, 2018, *supra* note 2.

²³ *Van der Peet*, *supra* note 4 at para 35.

²⁴ See *Haida Nation*, *supra* note 1.

Newman, as a positive response which addresses the past imbalances of power and curbs unilateral state action that may have severe impacts on Aboriginal peoples.²⁵

There have been many significant developments around the duty to consult, yet novel questions keep emerging. Authors in addition to Newman, such as Thomas Isaac²⁶ and Jack Woodward,²⁷ have engaged in various studies on the duty to consult. Most of these scholars, however, have focused on general clarifications of the existing law.

Newman²⁸ and Isaac²⁹ both examine the duty to consult doctrinally. Newman explains the duty to consult as a constitutional duty. He provides insight on some approaches to understanding the duty to consult and suggests possible influence on the future directions of the legal doctrine. Isaac gives a comprehensive study on the impact of Canadian law on Aboriginal peoples. He considers when the duty to consult is triggered, to whom the duty applies, and underscores the role of the Crown in reconciliation of Aboriginal interests with the Canadian society. Having been published in 2014 and 2016 respectively, these books are, however, increasingly dated. They do not cover the current relevant cases on duty to consult,³⁰ Canada's present position on *the United Nations Declaration on the Right of Indigenous Peoples (UNDRIP)*,³¹ or obviously anything specific to the duty to consult in the context of new technologies like SMRs. They do not cover studies on the CNSC's policies for Aboriginal consultation in the nuclear industry. In a more recent work, Dwight Newman³² traced the development of the duty to consult at a doctrinal level. He highlights the complexities around the jurisprudence of the duty to consult and the present and future challenges for the legal doctrine, but he remains grounded in present doctrine.

²⁵ Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing, 2014) at 15 [Newman 2014].

²⁶ Thomas Isaac, *Aboriginal Law*, 5th edn. (Canada: Thomson Reuter Canada, 2016) [Isaac].

²⁷ Jack Woodward, *Native Law* (Toronto: Thomson Reuter Canada, 2011).

²⁸ Newman 2014, *supra* note 25 at 25.

²⁹ Isaac, *supra* note 26.

³⁰ See for example, the relevant cases of *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, [2017] 1 SCR 1099, 2017 SCC 41. [*Chippewas of the Thames*]; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, [2017] 1 SCR 1069, 2017 SCC 40. [*Clyde River*]. In these cases, the Court determined that the Crown may fulfill its duty to consult through a government agency conferred with the authority to do so.

³¹ *United Nations Declaration on the Right of Indigenous Peoples*, U.N.G.A. GA Res. 61/295, U.N. Doc. A/RES/61/295. (Sept. 13, 2007), (2007), 46 I.L.M. 1013 [UNDRIP]

³² Dwight Newman, "The Section 35 Duty to Consult" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, ed., *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 349 [Newman-The Oxford Handbook].

Other scholars have offered critiques of the duty to consult doctrine as not sufficiently protective of Aboriginal peoples' rights. They have explored the values and limitations of the legal doctrine. Gordon Christie, for example, has written critiques on the duty to consult that are different from those offered in this thesis.³³ Christie examines court efforts to justify the "taking up" of lands by the government while simultaneously asserting Crown sovereignty over Aboriginal groups. He presents a different perspective that offers a foundation to build upon. Christie's argument is centered on what he perceives as a collaboration between the Court and the Crown to maintain a continuous colonial project. He looks at the power within the jurisprudence of the duty to consult from a colonial perspective.³⁴ He sees the duty to consult as "an assimilation tool, a link in the continuing chain of colonial jurisprudence."³⁵ Christie's work looks more at the formulation of the duty, while this thesis extends to the implementation of the legal duty. Authors like Kaitlin Ritchie, Rachel Ariss, Clara MacCallum Fraser, and Diba Nazneen Somani have in their works identified a number of limitations that pose serious threats to implementing the duty to consult and achieving the goal of reconciliation.³⁶ Ritchie identifies three areas of risks (delegation, capacity, and cumulative effect of consultation) that limit the meaningfulness of consultation and the realization of reconciliation. This thesis builds on such work in novel ways.

The courts have held that the goal of the duty to consult is to facilitate the reconciliation process.³⁷ On this, Mark Walters has argued for seeing reconciliation as a component of legality. He examines the use of the concept of reconciliation in the legal discussion on the rights of Aboriginal peoples in Canada.³⁸ But he does not apply this to the duty to consult doctrine.

³³ Gordon Christie, "A Colonial Reading of the Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation" (2005) 23:1 Windsor YB Access Just 17 at 44-45 [*Christie-A Colonial Reading*]; Gordon Christie, "Developing Case Law: The Future of Consultation and Accommodation" (2006) 39 UBC L Rev 139 [*Christie-Developing Case Law*].

³⁴ Christie-A Colonial Reading, *ibid* at 20.

³⁵ *Ibid*, at 43.

³⁶ Kaitlin Ritchie, "Issues Associated with the Duty to Consult and Accommodate Aboriginal Peoples: Threatening the Goal of Reconciliation and Meaningful Consultation" (2013) 46 UBC L Rev 397 [*Ritchie*]; Rachel Ariss, Clara MacCallum Fraser & Diba Nazneen Somani, "Crown Policies on the Duty to Consult and Accommodate: Towards Reconciliation?" (2017) 13 McGill JSDL 1 [*Ariss et al*].

³⁷ *Mikisew Cree*, 2018, *supra* note 3 at para 61.

³⁸ Mark D. Walters "The Jurisprudence of Reconciliation: Aboriginal Rights in Canada" in Will Kymlicka & Bashir Bashir, eds., *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008) [*Walters-The Jurisprudence of Reconciliation*].

However, growing international legal practice interacts with the Canadian duty to consult in some ways. The Canadian government, notably, has made known its commitment to fostering a harmonious Crown-Aboriginal relationship by declaring full support of the *UNDRIP*, thus making the body of work on these international norms all the more pertinent. There is a significant number of research on the *UNDRIP* which aims to protect Indigenous peoples' rights globally—for example, works by Xanthaki,³⁹ Anaya,⁴⁰ Joffe,⁴¹ and Doyle.⁴² The *UNDRIP* has been viewed as a comprehensive regime that protects Indigenous peoples' right to their traditional territories against states' unilateral action.⁴³ The *UNDRIP* provides, inter alia, for Indigenous peoples' rights to free, prior, and informed consent (FPIC). Doyle contextualizes the FPIC requirement in the view of Indigenous historical sovereignty.⁴⁴ He states that FPIC is not at odds with development or sincere public interest, but “complementary to them and necessary for their inclusive and non-discriminatory realization.”⁴⁵ Anaya states that FPIC should not be perceived as Indigenous peoples having general veto rights over states' decisions.⁴⁶ He argues that the objective of consultation should be to obtain Indigenous peoples' consent while “avoiding imposition of the will of one party over the other”⁴⁷ This thesis relies on a characterization of FPIC like that offered by Doyle⁴⁸ and Anaya⁴⁹ to argue that FPIC does not contemplate a general veto-right over state decisions, especially if the impact of the proposed state activity will not be profound. FPIC, on this conception, is a requirement that states should consult with Indigenous peoples in good faith with the aim to reach an agreement before proceeding with a project, particularly when a proposed development is capable of affecting Indigenous peoples' rights.

³⁹ Alexandra Xanthaki, “Indigenous Rights in International Law over the Last 10 Years and Future Developments” (2009) 10 Melbourne J Int'l L 27 [Xanthaki].

⁴⁰ Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya, UN Doc A/HRC/12/34, 15 July 2009 [Anaya Report, 2009].

⁴¹ Paul Joffe, “UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation” (2010) 26 NJCL 121 [Joffe 2010]. See also Michelle Biddulph & Dwight Newman, “A Contextualized Account of General Principles of International Law” (2014) 26 Pace Int'l L Rev 286; Fons Coomans, “The Ogoni Case Before the African Commission on Human and Peoples' Rights” (2003) 52 ICLQ 749.

⁴² Cathal M. Doyle, *Indigenous Peoples, Title to Territories, Rights and Resources: The Transformative Role of Free, Prior and Informed Consent* (London: Routledge, 2015) [Doyle].

⁴³ Xanthaki, *supra* note 39 at 31; Joffe 2010, *supra* note 41 at 145.

⁴⁴ Doyle, *supra* note 42 at 4.

⁴⁵ *Ibid.*, at 6.

⁴⁶ Anaya Report, 2009, *supra* note 40 at para 46.

⁴⁷ Doyle, *supra* note 42 at 149.

⁴⁸ *Ibid.*

⁴⁹ Anaya Report, 2009, *supra* note 40.

This research attempts to enlarge on the above literature in discussing the Crown's legal obligation to consult, using the example of proposed SMR projects. This thesis essentially builds on the views set forth by Newman, Isaac, Christie, Woodward, Walters,⁵⁰ and other scholars while offering a novel take on the duty to consult.

⁵⁰ Newman 2014, *supra* note 25; Isaac, *supra* note 26; Christie-A Colonial Reading, *supra* note 33; Woodward, *supra* note 27; Walters-The Jurisprudence of Reconciliation, *supra* note 38.

Chapter 2: Example of SMRs as a Future Development Engaging the Duty to Consult

2.0 Introduction

The Canadian Nuclear Safety Commission (CNSC) has employed the Risk-Informed Decision Making (RIDM) model in assessing nuclear activities. The Commission has used the risk-informed approach to assess risks at the licensing and decision-making stages. The RIDM process offers information on the risks of nuclear activities on the environment and recommends measures to control the risks. The RIDM addresses all the significant risks related to any issue that supports “decisions in areas of licensing, compliance, and planning and resource allocation.” Apart from safety issues, “other sources of risks, related to the CNSC mandate and objectives, including environmental and organizational risks, are also accounted for in the decision-making process.”⁵¹ It is in line with the CNSC approach that this chapter proceeds to explore the potential impacts of SMRs on Aboriginal peoples.

This chapter reviews the fundamentals of SMRs and some potential impacts of SMRs on Aboriginal peoples. It sets out, in more detail, the potential Aboriginal interests that may be impacted in the course of deploying SMRs and during their operation in the context of Aboriginal peoples in Saskatchewan. These likely impacts include taking up of Aboriginal traditional lands, impacts on water bodies which may restrict Aboriginal peoples from the continuous exercise of Aboriginal fishing rights, and restriction of movement from the excluded zone. The chapter thus sets up an example of the future duty to consult doctrine in the context of a technology presently in ongoing development—because the duty to consult applies to potential infringements, it will end up needing to apply to SMR deployment.

⁵¹ A. Bujor, G. Rzentkowski & D. Miller, “Development of Risk-Informed Regulatory Positions on Candu Safety Issues, Part I: Methodology Development for Risk Estimation and Evaluation” (2010), in International Atomic Energy Association (IAEA), *Good Practices in Heavy Water Reactor Operation* (IAEA: Vienna, Australia 2010) IAEA-TECDOC-1650 at 25.

2.1 Fundamentals of Small Modular Reactors

SMRs are advanced nuclear power plants that can be constructed in factories and transported to deployment sites for installation.⁵² There is no universal meaning for the term SMR. The acronym also differs as it may stand for small modular reactors, small and medium reactors, and small and medium modular reactors.⁵³ Generally, “SMRs” refers to nuclear reactors generating power of less than 700 MWe. Unlike conventional/large nuclear plants that generate a range of 700 MWe and above, small reactors generate power below 300 MWe, while medium reactors generate between 300 – 700 MWe.⁵⁴ Different types of nuclear reactors have been used for medical purposes, for material testing research purposes, and power generation.⁵⁵

In recent years SMRs have been attracting significant attention globally because of increasing concerns related to energy supply security and the urgent need to mitigate climate change.⁵⁶ Designers of SMR technologies aim for substantial “cost reduction through modularization and... shorter construction schedule than... larger nuclear power plants.”⁵⁷ The International Atomic Energy Agency (IAEA) outlined the driving forces in the development of SMRs: “meeting the need for flexible power generation for wider range of users and applications; replacing the aging fossil fuel-fired power plants; enhancing safety performance through inherent and passive safety features; offering better upfront capital cost affordability; suitability for cogeneration and non-electric applications; options for remote regions with less developed

⁵² International Atomic Energy Agency (IAEA), *Progress in Design and Technology Development for Innovative Small and Medium Sized Reactors, Nuclear Technology Review, ANNEX IV* (Vienna: IAEA, 2007) [IAEA, 2007]; Nuclear Energy Agency, *Small Modular Reactors: Nuclear Energy Market Potential for Nuclear Development* (Organization of Economic Co-operation and Development, 2016) at 15.

⁵³ CNSC Discussion Paper, *supra* note 10 at 32.

⁵⁴ Giorgio Locatelli, Chris Bingham & Mauro Mancini, “Small Modular Reactors: A Comprehensive Overview of their Economics and Strategic Aspects” (2014) 73 *Progress in Nuclear Energy* 75 at 76.

⁵⁵ CNSC Discussion Paper, *supra* note 10 at 1.

⁵⁶ See generally Gordon R. Thompson, *Design and Siting Criteria for Nuclear Power Plants in the 21st Century*, (Institute for Resource and Security Studies, 2008); Director General, International Atomic Energy Agency, *International Status and Prospects for Nuclear Power*, GOV/INF/2017/12-GC(61)/INF/8 (28 July 2017) at para 22 [IAEA-DG Report, 2017].

⁵⁷ International Atomic Energy Agency, *Instrumentation and Control Systems for Advanced Small Modular Reactors* (Vienna: IAEA, 2017); D.W. Hummel et al, *Establishing Emergency Planning Zone Size Requirements for Small Modular Reactors Based on Predictable Radiological Dose Consequences From Hypothetical Severe Accidents*, 38th Annual Conference of the Canadian Nuclear Society and 42nd Annual CNSC/CAN Student Conference, Saskatoon, Canada (June 3-6, 2018).

infrastructures; and offering possibilities for synergetic hybrid energy systems that combine nuclear and alternate energy sources, including renewables.”⁵⁸

Presently there has been a significant advancement in SMRs, with approximately 50 SMR concepts and designs under various stages of construction. Dozens of these reactors are claimed to be close to the deployment stage.⁵⁹ Notably, Russia, China, and Argentina have demonstration power plants which are at advanced stages. The Russian Federation’s KLT-40s, which is a design based on a third generation KLT-40 marine propulsion plant, is an advanced version of a reactor developed for a floating nuclear power plant (FNPP) to provide the capacity of 35 MW(e) per module.⁶⁰ China is equally building the HTR-PM reactor, which is a high-temperature gas-cooled reactor pebble-bed module, and the ACP100 design.⁶¹ In Argentina, the Central Argentina de Elementos Modular (CAREM-25) which has a thermal power of 100MW ((30MW (e)), is under construction.⁶² After these demonstration projects move to commercial development, the initial commercial fleet of SMRs is projected to begin operation between 2025 and 2030.⁶³

In Canada, different vendors are suggesting SMRs as an alternative to high-cost diesel-fired generators.⁶⁴ There were 80 responses from across Canada and around the world comprising reactor developers, suppliers or service providers, academic/research organizations, communities and individuals, and potential-end users indicating interest in the Canadian nuclear laboratories’ (CNL) Request for Expression of Interest (RFEOI).⁶⁵ The RFEOI also generated 18 design proposals, out of which 8 have a capacity between 0 to 15 MW.⁶⁶ Having declared SMRs as one of its seven strategic initiatives, CNL is expected to deploy a demonstration SMR plant on its

⁵⁸ IAEA, 2007, *supra* note 52; *Canada Nuclear Laboratories, CNL and CNS Launch International Generation IV and Small Modular Reactors Conference* (February 21, 2018), online: <<http://www.cnl.ca/en/home/news-and-publications/news-releases/2018/cnl-and-cns-launch-international-generation-iv-and.aspx>> (Accessed March 30, 2018). See also D.T. Ingersoll, “Small Modular Reactors for Producing Nuclear Energy: International Development” in Mario D. Carelli & T. Ingersoll, eds., *Handbook of Small Modular Nuclear Reactors* (Cambridge: Woodhead Publishing, 2015) at 27.

⁵⁹ IAEA-DG Report, 2017, *supra* note 56 at para 6.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ NEI-Holtec, *supra* note 16.

⁶⁵ Canada Nuclear Laboratories, *Perspectives on Canada’s SMR Opportunity, Summary Report: Request for Expressions of Interest- CNL’s Small Modular Reactors Strategy* (2017) at 2-3 online, <http://www.cnl.ca/site/media/Parent/CNL_SmModularReactor_Report.pdf> (Accessed August 20, 2018).

⁶⁶ See NEI-Holtec, *supra* note 16.

Chalk River sites by 2026. It is uncertain the number of different SMR designs that are presently being constructed, the CNSC, however, is reviewing twelve different models of SMR.⁶⁷

SMR may be attractive for the province of Saskatchewan. Recently, the Saskatchewan Premier signed a memorandum of understanding with Ontario and New Brunswick Premier to support the commitment to work together on the development and placement of SMRs. The Premier highlighted the importance of the province meeting the emission-free goal, respecting the federal government's desire to eliminate the use of "coal-fired" power generators by 2030. This is very important for Saskatchewan, especially, as it relies heavily on coal-fired plants.⁶⁸ SMRs could help Saskatchewan to hit its carbon emission goals, "which would require a 40 [percent] reduction in 2005 emission levels in the next decade."⁶⁹

2.2 Potential Impacts of SMR Operation on Aboriginal Peoples' Rights

This section discusses in general terms some possible impacts of SMR deployment in the context of Saskatchewan and the resulting duty to consult obligations on a conventional understanding of the legal doctrine. It identifies some of the Aboriginal interests that could be affected during the deployment and operation of SMRs. It argues that the placement of SMRs will most likely trigger the Crown's duty to consult given the potential impact of SMR operations, such as taking up of Aboriginal land, impact on water bodies and Aboriginal fishing rights, and restriction of movement from the excluded zone around each SMR.

Despite the potential benefits of nuclear technology, SMRs may negatively impact Aboriginal peoples' rights in various ways. Saskatchewan is under Treaties 2, 4, 5, 6, 8, and 10.⁷⁰ By the terms of Treaties 4, 5, 8, and 10, Aboriginal peoples retain the rights to continue their traditional

⁶⁷ Canada, Canadian Nuclear Safety Commission, "Pre-Licensing Vendor Design Review" (October 24, 2019) (Accessed December 3, 2019), online: <<http://nuclearsafety.gc.ca/eng/reactors/power-plants/pre-licensing-vendor-design-review/#R3>>

⁶⁸ Brian Zinchuk, Pipeline News, *Saskatchewan Signs MOU with Ontario and New Brunswick on Small Modular Reactor Development* (December 3, 2019), online: <<https://www.jwnenergy.com/article/2019/12/saskatchewan-signs-mou-ontario-and-new-brunswick-small-modular-reactor-development/>>

⁶⁹ See *Premier Scott Moe Signs Agreement*, *supra* note 21.

⁷⁰ Office of the Treaty Commissioner, *Treaty Map* (2018) < http://www.otc.ca/pages/treaty_map.html > (accessed October 12, 2018). According to the Office of the Treaty Commissioner, Saskatchewan is also covered by part of Treaty 7, although it does not appear on all treaty maps of the province.

vocations of hunting, trapping, and fishing. It is not certain if such privileges could be exercised under treaty 2 as the Crown made only an oral commitment to the exercise of these rights.⁷¹

It is important to mention that the *Natural Resource Transfer Agreement Act (NRTA)* aims to protect the continuous exercise of Aboriginal peoples' right to hunting, trapping, and fishing.⁷² The Court held in *Moosehunter* that the *NRTA* has the "effect of merging and consolidating the treaty rights of the *Indians* in the area and restricting the power of the provinces to regulate the *Indians*' right to hunt for food. The right of *Indians* to hunt for sport or commercially could be regulated by provincial game laws but the right to hunt for food could not."⁷³ While the *NRTA* restricts the right to hunt for commercial purpose, it substantially expanded the area within which those Aboriginal persons who are members of First Nations in Saskatchewan can hunt for food. Further, as a result of the *NRTA*, the Supreme Court in *R. v. Horseman*⁷⁴ explained that the method used by Aboriginal peoples to hunt for food is out of the scope of provincial governments. Whereas other hunters may not have the right to hunt at every season of the year or all types of game they may want to kill, First Nations individuals are not subject to these limitations. They can hunt at every season and can kill any species.⁷⁵ In essence, the *NRTA* expanded both the area of Aboriginal hunting and the means of hunting. It also restricts the jurisdiction of provincial governments to regulate the right of hunting for food.

In considering SMR deployment, the Crown needs to consider the impacts of rights held under these treaties. Significantly, the treaty rights issues that will be addressed include the issue of disturbance of some areas of land for the construction of SMRs, impingement and entailment, and thermal effluent. In addition, the increase in demand for water necessary for cooling SMRs will increase stresses on water sources.⁷⁶ Storage and transportation of spent fuel and nuclear

⁷¹ Isaac, *supra* note 26 at 158-62.

⁷² *The Saskatchewan Natural Resources Act*, SC 1930, c 41 [*NRTA*]:

[12] In order to secure to the *Indians* of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the *Indians* within the boundaries thereof, provided, however, that the said *Indians* shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said *Indians* may have a right of access.

⁷³ *Moosehunter v. The Queen*, [1981] 1 SCR 282 at 285.

⁷⁴ *R. v. Horseman*, [1990] 1 SCR 901 [*Horseman*].

⁷⁵ *Ibid.*

⁷⁶ M.V. Ramana & Ali Ahmad "Wishful Thinking and Real Problems: Small Modular Reactors, Planning Constraints, and Nuclear Power in Jordan" (2016) 93 Energy Policy 236 at 242 [*Ramana & Ahmad*].

waste to the repository site may also become an issue that may implicate treaty rights.⁷⁷ Other issues that require consideration include the risks attendant to any incident at an SMR, even if various factors are meant to make these particularly unlikely in the operation of an SMR.

2.2.1 Taking Up Aboriginal Traditional Lands

The siting of SMRs would include taking up of land and disturbance of tracts of land where SMRs are sited. The small size of SMRs and their modularity offer unique deployment options. SMRs could be deployed in large numbers or as a single reactor.⁷⁸ Where a single SMR is deployed, it may present little or no impact as it will require only a small area of land. Deployment of SMR as multiple reactors in a fleet, though, may require taking up large areas of land and could significantly impact on Aboriginal peoples' treaty rights. Similarly, construction of power lines that will transmit electricity from the power plant to the end users may also impact Aboriginal peoples' treaty rights.

In *Grassy Narrows First Nation v. Ontario (Minister of Natural Resources)*,⁷⁹ the Court held that the Crown may take up land under treaty. The power to take up land is not unconditional and must be exercised in conformity with the honour of the Crown.⁸⁰ The Crown's authority to take up lands covered by treaty is burdened by the Crown's duty to consult and, if appropriate, accommodate Aboriginal peoples' interests beforehand.⁸¹

Where the Crown contemplates taking up lands for implementing a project, the Crown must consider the impact the project could have on the exercise of Aboriginal peoples' rights to hunt, fish and trap, and it must inform affected Aboriginal peoples of its findings.⁸² The Crown "must then deal with the [affected Aboriginal peoples] in good faith, and with the intention of substantially addressing" their concerns.⁸³ Moreover, the negative impact of the Crown's

⁷⁷ See for example, Jim Green, "Radio Active Waste and Australia's Aboriginal people" (2017) 22 *Angelaki J Theoretical Humanities* 33 at 42.

⁷⁸ See generally, CNSC Discussion paper, *supra* note 10.

⁷⁹ *Grassy Narrows First Nation v. Ontario (Minister of Natural Resources)*, [2014] 2 SCR 447 [*Grassy Narrows*].

⁸⁰ *Ibid.*, at para 50.

⁸¹ *Ibid.*, at para 51.

⁸² *Ibid.*, at para 52. See also *Mikisew Cree*, *supra* note 2 at para 55.

⁸³ *Grassy Narrows*, *ibid.* at para 55.

decision is subject to the degree of the impact, but then consultation must not ignore accommodation from the onset.

It is not every taking up by the Crown that constitutes an infringement of Aboriginal traditional harvesting rights set out in a treaty.⁸⁴ In *Mikisew Cree*, the court held that “taking up land for a purpose expressed or necessarily implied in a treaty itself cannot be considered an infringement” of treaty rights.⁸⁵ However, if taking up so much land will leave Aboriginal peoples with “no meaningful right to hunt, fish or trap in relation to the territories over which they traditionally hunted, fished, and trapped, a potential action for treaty infringement will arise”⁸⁶

Taking up of land for the deployment of SMRs may limit Aboriginal peoples’ treaty rights, such as through an infringement on treaty rights to fish, hunt, or trap. The potential diminution in the quantity of the harvest of wildlife and the “fragmentation of wildlife habitat, disruption of migration patterns, loss of vegetation, increased poaching because of easier motor vehicle access to the area and increased wildlife mortality due to motor vehicle collisions” was held in *Mikisew*, also in a treaty context, to be enough to trigger the duty to consult.⁸⁷ Thus, it appears that a proposed placement of an SMR or fleet of SMRs and subsequent operation could adversely affect Aboriginal hunting and trapping treaty rights and could then trigger the constitutional duty to consult.

2.2.2 Potential Impacts of Operation on Water Bodies and Aboriginal Fishing Rights

The operation of some models of SMRs will require a significant amount of water to cool reactor cores and then involve the transfer of the warm waste into water bodies. Some advocates of SMRs claim that SMRs will need less water compared to traditional power plants.⁸⁸ As stated above, SMR deployment could require a “‘fleet’ based approach” for standardized operations and benefits from reduced capital costs.⁸⁹ Where SMRs that use water for cooling are deployed

⁸⁴ *Ibid.*

⁸⁵ *Mikisew Cree*, *supra* note 2 at para 48.

⁸⁶ *Grassy Narrows*, *supra* note 79 at para 52.

⁸⁷ *Mikisew Cree*, *supra* note 2 at para 44.

⁸⁸ Raman & Ahmad, *supra* note 74 at 243.

⁸⁹ Canadian Small Modular Reactor (SMR) Roadmap Energy and Mines Ministers’ Conference (EMMC) (2018); Pedraza, *supra* note 18 at 132.

in large numbers, they will need higher water withdrawal levels than the traditional plant.⁹⁰ Water intakes and discharges from nuclear plants expel heat into the atmosphere and nearby water bodies, which result in thermal pollution, affecting the “aquatic food web from benthic organisms” to plankton and fish.⁹¹ This process of water intake and withdrawal is believed to harm fish by “physical disturbances, impingement and entrainment”⁹², and thermal effects.”⁹³ The drawing of water for SMR activities may have some potential adverse impacts on Aboriginal peoples’ treaty rights to fishing and trapping rights, thereby requiring that the Crown consult the potentially affected Aboriginal peoples.

Approving operating licenses to SMRs developers can affect Aboriginal fishing rights, and the Crown will have to consult the affected Aboriginal peoples on that issue. The Crown is required to consider and address the impacts of its decision to issue licenses to proponents may have on Aboriginal fishing rights protected under section 35. The drawing of water for SMR operations may amount to infringement if it is considered to have significant effects on Aboriginal peoples’ exercise of their constitutionally protected rights to fish.⁹⁴

⁹⁰ Raman & Ahmad, *supra* note 74 at 243.

⁹¹ Love Råman Vinnå, Alfred Wüest, Damien Bouffard “Physical Effects of Thermal Pollution in Lakes” (2017) Water Resources Research at 3968. Online: <<https://agupubs.onlinelibrary.wiley.com/doi/epdf/10.1002/2016WR019686>> (accessed October 13, 2018).

⁹²Stephen Crawford et al, Saugeen Ojibway Nation-Bruce Power (SON-BP) Collaborative Lake Whitefish Research Program: University of Guelph Team Analysis of Bruce Power Responses to University of Guelph Team Comments on “Bruce A Refurbishment for Life Extension and Continued Operations Environmental Assessment Followup Program Draft Operations Phase Impingement and Entrainment Monitoring Plan” (Golder Associates, July 2011) (University of Guelph, August 7, 2012):

Impingement is the process by which organisms which are generally larger than or equal to either the Bruce A (Units 1-4) cooling water pump intake screens or the cooling water travelling screens are held against the screens by the through-flow. Entrainment is the process by which organisms that are generally smaller than either the Bruce A (Units 1-4) pump intake screens or cooling water traveling screens are drawn through the screens by the through-flow.

⁹³ CNSC, *Oral Presentation Submission from the Saugeen Ojibway Nation* (April 23, 2018) CMD 18-H4.146 at 15 [CNSC-SON Submission April 23, 2018]; Kayla Hamelin, “Effects of Thermal Effluent on the Diversity and Distribution of Benthic Invertebrates in the St. Lawrence River” (Montréal: Department of Biology, McGill University, December 2013) at 15: “Thermal effluent is the hot water discharged from power-generating stations and industrial operations.”

⁹⁴ *R.v. Sparrow* [1990] 1 SCR 1075 at para 1106 [Sparrow].

2.2.3 Exclusion Zone for SMRs

SMRs may need exclusion zones (designed barriers) to avoid accidental discharge of substantial radioactivity in the event of a nuclear incident.⁹⁵ SMR exclusion zones may require a radius ranging from 0.4 km to 0.8 km for 50MWe and 300MWe reactors respectively.⁹⁶ Nuclear reactors may also be buried underground or confined in a container. Where this is the case, the radius for the exclusion zone may be reduced or may not be needed at all. Further study is needed to “develop a method to account for the effect of such an enclosure on the size of the exclusion zone.”⁹⁷ The exclusion area will be under the complete management of the licensee, restricting all activities within the area. The existence of such an exclusion zone will likely limit Aboriginal groups from exercising their rights such as have been mentioned earlier.

It is said that burying reactors underground aims to reduce the magnitude of danger that may occur in the event of a natural disaster or other incidents, but this could itself create a different problem. For example, it could increase the chances of contaminating water underground and make the recovery of radioactive materials or waste complicated.⁹⁸

2.2.4 Nuclear Waste

One of the critical issues that needs to be factored in during the decision-making process for the placement of SMRs is the issue of management of nuclear waste generated from SMR operation. Even though the management of nuclear waste is somewhat different from the development of SMR, the operation of SMRs will produce nuclear waste, and the management of this radioactive waste is one of the environmental concerns correlated to nuclear power which needs to be considered seriously.

⁹⁵ E.M.A. Hussein et al, “A Case Study on Introduction of Small Modular Reactors into a New Non-Nuclear Jurisdiction” (September 2018) 39:3 Canada Nuclear Soc’y Bull 25 [*Hussein et al*].

⁹⁶ B.E.R. Lulik, D. deMontingy & E.M.A.Hussein, “Is an Exclusion Zone Needed for Small Modular Reactors?” Paper Delivered at the 38th Annual Conference of the Canadian Nuclear Society and 42nd Annual Student Conference, Saskatoon, Canada (June 3-6, 2018) at para 5.

⁹⁷ *Ibid* at para 5; Hussein et al, *supra* note 95 at 25.

⁹⁸ Pedraza, *supra* note 18 at 14.

It is believed that SMRs will likely produce lesser quantities of radioactive waste “per unit of electricity generated” than the traditional plant.⁹⁹ However, several models of SMRs can be constructed and deployed to operate with various generators in many different sites. This means that SMRs could generate spent fuel in various locations, resulting in more challenges in recovering or managing spent fuel than anticipated.¹⁰⁰ Saskatchewan may need to set up structures for the management of nuclear waste: it will need to construct a temporary repository site before it could be transported to a permanent site if it has no permanent site.

The choice of the repository site for nuclear waste will require that some designated areas be restricted, having the potential to implicate Aboriginal rights, and so limiting Aboriginal peoples from pursuing the negotiated course within the restricted areas. At its worst, there could be a release of radioactive material during the transportation of used fuel, with lasting and harmful results such as contaminated soils, water, and vegetation.¹⁰¹ Although this has been described as unlikely to occur, there is a need to consider it.

2.2.5 Uranium Mining

Although remotely related to the deployment of SMRs, uranium has been described as having a significant link with SMRs as it would serve as a source of fuel.¹⁰² Increased uranium mining in Canada may be anticipated, with SMR operations possibly reviving the dropping fortunes of the industry.¹⁰³ This means an increase in the amount of uranium mining in Saskatchewan.

It is crucial, however, to mention that going by Canadian court decisions, any alleged potential adverse impacts arising from a possible increase in uranium mining relating to SMRs do not bear

⁹⁹ M.V. Ramana and Zia Mian, “Small Modular Reactors and the Challenges of Nuclear Power” Forum of Physics and Society (January 2017), online: <<https://www.aps.org/units/fps/newsletters/201701/reactors.cfm>> (accessed June 26, 2018).

¹⁰⁰ Pedraza, *supra* note 18 at 14, 21.

¹⁰¹ Ramana & Ahmad, *supra* note 76 at 243.

¹⁰² See generally, Ken Coates & Dazawray Landrie-Parker, “Northern Indigenous Peoples and the Prospects for Nuclear Energy” (Fedoruk Centre), online: <<https://www.schoolofpublicpolicy.sk.ca/documents/research/archived-publications/icngd-publications/icngd-reports/Small%20Nuclear-Final%20Version%204%20June.pdf>> (Accessed February 12, 2018) [Coates & Landrie-Parker].

¹⁰³ *Ibid*; Benjamin Omoruyi “Indigenous Peoples’ Participation in Regulatory Frameworks for Small Modular Reactors (SMRs) Operations in Canada” 1st International Conference on Generation IV and Small Reactors, Ottawa Marriott Hotel, Ottawa, ON, Canada, November 6-8, 2018 at para 3.1 [Omoruyi Conference Paper].

on consultation on SMR siting, as they would appear to fall in the category of remote, speculative impacts. The Crown's duty to consult will not arise until there is a non-speculative impact on rights.¹⁰⁴ The claim must be more than a "speculative impact" of governmental conduct before the duty to consult is triggered. The potentially affected Aboriginal groups need to "show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights."¹⁰⁵ An assertion based on mere speculative or non-appreciable impacts will not meet the requirement.¹⁰⁶ There must be an "apprehended, evidence-based potential or possible impact on Aboriginal rights" concerning SMRs,¹⁰⁷ and there must be an immediate connection between the possible adverse effects and the contemplated Crown conduct.¹⁰⁸

2.3 Conclusion

Despite their constructive prospects, SMRs may adversely affect treaty rights in many ways. Some of the potential impacts include taking up of Aboriginal traditional lands in ways affecting hunting rights, thermal pollution on water bodies and resulting impacts on Aboriginal fishing rights, and restriction of movement from the excluded zone around each SMR. These impacts could affect Aboriginal treaty rights and thus would trigger the duty to consult. On standard rules on the duty to consult, there would be a duty to consult concerning these impacts.

¹⁰⁴ *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 at para 106; [*Hupacasath First Nation*].

¹⁰⁵ *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650 at para 45 [*Rio Tinto*],

¹⁰⁶ *Ibid* at para 46; *Hupacasath First Nation*, *supra* note 104 at paras 2, 8.

¹⁰⁷ *Hupacasath First Nation*, *ibid*, at para 105.

¹⁰⁸ *Buffalo River Dene Nation v. Saskatchewan (Energy and Resources)*, 2015 SKCA 31 at paras 104, 105.

Chapter 3: Consultation and Accommodation

3.0 Introduction

The Supreme Court of Canada has stated that section 35 provides a constitutional basis for “the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.”¹⁰⁹ In later cases, notably on the duty to consult, it has continuously stated that section 35 of the constitution aims to foster the “reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship.”¹¹⁰

The duty to consult is a major aspect of the goal of reconciliation of Aboriginal peoples and the Crown/non-Aboriginal society. The Supreme Court of Canada sets out the doctrine of duty to consult and accommodate in relation to developments which may have possible adverse effects on Aboriginal or treaty rights. In view of that, Canada has established policies and guidelines designed to address Aboriginal peoples’ concerns in keeping with the Crown’s legal duty.

The duty to consult endeavours to enforce the honour of the Crown, a concept that is based on the principle that the Crown, in exercise of the duty to consult, should refrain from “sharp dealing” and act honourably at every stage. The duty to consult has progressively developed, requiring the Crown to relate with Aboriginal peoples in keeping with honourable conduct.¹¹¹

As a legal doctrine, the duty to consult connects in many “significant ways with all of the questions about resource development and its possibilities for Aboriginal Canadians.”¹¹² The duty to consult protects Aboriginal peoples’ fundamental interests. Consultation processes provide Canadian Aboriginal groups with protections for Aboriginal and treaty rights when Crown decisions may adversely affect these rights, “while asking Canadian governments always to be more engaged with Aboriginal issues.”¹¹³ Consultation processes function to ensure prior assessment of all possible negative effects of the proposed development on Aboriginal land, as

¹⁰⁹ *Van der Peet*, *supra* note 4 at para 31.

¹¹⁰ *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103 at para 10 [*Little Salmon*]; Dwight Newman, “The Rule and Role of Law: The Duty to Consult, Aboriginal Communities, and the Canadian Natural Resource Sector” (Ottawa: Macdonald-Laurier Institute, 2014) at 8. [*Newman-RRL*]; See generally Gray-INAC Report, 2016, *supra* note 6.

¹¹¹ *Newman- RRL*, *ibid*, at 8; *Haida Nation*, *supra* note 2 at para 48; *Mikisew Cree*, *supra* note 2 at para 66; *Little Salmon*, *ibid*, at para 14.

¹¹² *Newman- RRL*, *supra* note 118 at 19.

¹¹³ *Ibid*.

well as the level of such impact on their Aboriginal rights and interests, and possible accommodation measures where appropriate.

Nevertheless, to many Aboriginal peoples, resource project development often fits uneasily into Aboriginal peoples' determination to protect their rights and traditional territory. In many cases, there have been concerns about the level of engagement with Aboriginal peoples in decision-making before carrying on these projects. According to Bryn Gray, many Aboriginal peoples view "Canada's approach as largely a one-size-fits-all box-ticking exercise that fails to meaningfully address their concerns and relies too heavily on industry proponents and regulatory processes."¹¹⁴ As practised, the duty to consult does not fulfill its principled underlying purposes. This chapter traces the development of the legalistic rules on the duty to consult, setting up the possibility of a different approach to the duty to consult more geared to reconciliation.

3.1 Evolution of the Duty to Consult: from *Haida Nation* to *Chippewas*

Following the prior Supreme Court of Canada cases of *R v Sparrow*¹¹⁵ and *Delgamuukw v. British Columbia*¹¹⁶ where the Court mentioned consultation as part of the infringement analysis, the Court's discussion of the duty to consult doctrine appeared in a trilogy of cases in 2004 and 2005.¹¹⁷ This trilogy expounded the constitutional duty of the Crown to consult and accommodate Aboriginal peoples, based on the honour of the Crown and the implications of section 35.¹¹⁸ The Supreme Court in these cases formulated a legal doctrine of duty to consult and, where appropriate, accommodate Aboriginal peoples' rights.¹¹⁹ The 2004 decisions in *Haida Nation* and *Taku River* set out the Crown's obligation to consult on decisions that may adversely impact Aboriginal rights. The 2005 case of *Mikisew Cree* further extended the doctrine to treaty rights. Based on these cases, the Crown has the duty to consult Aboriginal peoples "when the Crown has knowledge, real or constructive, of the potential existence of the

¹¹⁴ See generally, Gray- INAC Report, 2016, *supra* note 6 .

¹¹⁵ *Sparrow*, *supra* note 94 at para 1119.

¹¹⁶ *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at para 168 [*Delgamuukw*].

¹¹⁷ *Haida Nation*, *supra* note 2 at para 35. See generally *Taku River*, *supra* note 2; *Mikisew Cree*, *supra* note 2.

¹¹⁸ *Haida Nation*, *ibid* at para. 16.

¹¹⁹ *R v. Badger*, [1996] 1 SCR 771 at para. 41.

Aboriginal right or title and contemplates conduct that might adversely affect the right in question.”¹²⁰

Since the 2004-05 trilogy, the Supreme Court of Canada has decided additional cases that have added additional legal rules concerning the application of the duty to consult, such as *Rio Tinto* on consultation by administrative boards,¹²¹ *Little Salmon* on consultation in the context of a modern treaty,¹²² and *Behn v Moulton Contracting* on who is consulted.¹²³ The relatively recent 2017 cases of *Clyde River* and *Chippewas of the Thames* engaged significantly with what will amount to the discharge of meaningful consultation.¹²⁴

The decisions in *Clyde River* and *Chippewas of the Thames* provide important understandings on what the courts will consider amounts to the discharge of the Crown’s obligations. In these cases, the Court considered whether the Crown could rely on decision-making processes carried out by Canada’s National Energy Board (NEB) to fulfill its duty. Although the Supreme Court reached different conclusions on whether the Crown’s duty to consult had been discharged in the circumstances of the two cases, the Court concluded that the Crown may fulfill the legal duty through an administrative body or a regulatory agency (for example, the licensing process of the CNSC and the environmental assessment process of the Canadian Environmental Assessment Agency), provided the agency is vested with the statutory authority to carry out what the duty to consult requires in the particular circumstances.¹²⁵ While the decisions relied largely on already established legal principles, they provide useful insight into the ability of the government to discharge the Crown’s obligation through relying on regulatory processes.¹²⁶ The decisions also provide clarity for regulatory processes that will not satisfy the Crown’s consultation obligations; for example, relying solely on a general environmental assessment process would not typically discharge the duty to consult and accommodate. It is important to consider the asserted

¹²⁰ *Haida Nation*, *supra* note 2 at para. 35.

¹²¹ *Rio Tinto*, *supra* note 103.

¹²² *Little Salmon*, *supra* note 110. *Little Salmon* was the first Supreme Court of Canada decision that engaged fully with modern treaties in the context of the Crown’s duty to consult.

¹²³ *Behn v Moulton Contracting Ltd.*, 2013 SCC 26.

¹²⁴ See generally, Nigel Bankes, “Clarifying the Parameters of the Crown’s Duty to Consult and Accommodate in the Context of Decision-making by Energy Tribunals” (2018) 36 J Energy & Nat Res L 163 at 164 [*Bankes*].

¹²⁵ *Chippewas of the Thames*, *supra* note 30 at para 32; *Clyde River*, *supra* note 30 at para 30.

¹²⁶ Bankes, *supra* note 124 at 164.

Aboriginal and treaty rights and interests and accommodate them where appropriate. In terms of procedure, a document dump would not suffice.¹²⁷

3.2 The Scope of the Duty to Consult

Once it is determined that the duty to consult is triggered by the Crown's contemplated action, the Crown takes further steps to ascertain the content and scope of consultation required and, where appropriate, provide accommodation. The Supreme Court, *per* McLachlin C.J.C. though, advised that the concept of a spectrum does not imply a rigid legal compartment but is based on particular circumstances.¹²⁸ Every case should be approached flexibly and individually in that consultation may disclose novel information requiring a change in the level of consultation.¹²⁹

To that end, the Crown is required to act in good faith in all cases to ensure that there has been meaningful consultation in particular circumstances. The Supreme Court of Canada in *Haida Nation* put forward a spectrum-based description:

At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice.¹³⁰

At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases, deep consultation, aimed at finding a satisfactory interim solution, may be required.¹³¹

Where a duty to consult exists, a duty to accommodate is expected, but it is not required in every instance.¹³² Accommodation includes taking steps to avoid severe harm, mitigating, or minimizing the effects of a proposed activity on Aboriginal rights.¹³³ Essentially the court has held that meaningful consultation may reveal a duty to accommodate, especially where there exist established rights or a strong *prima facie* claim for Aboriginal rights or title and the

¹²⁷ *Clyde River*, *supra* note 30 at paras 46, 49.

¹²⁸ *Haida Nation*, *supra* note 2 at para. 43.

¹²⁹ *Ibid.*, at para 45.

¹³⁰ *Ibid.*, at para 43.

¹³¹ *Ibid.*, at para 44.

¹³² *R. v. Marshall*, [1999] 3 SCR 533 at para 22.

¹³³ *Haida Nation*, *supra* note 2 at paras 46-48.

consequences of the proposed decision may have significant adverse impacts on these asserted or established rights.¹³⁴ Accommodation involves balancing Aboriginal concerns with the possible impact that the specific government decision may have on those Aboriginal concerns and with competing public concerns.¹³⁵ However, accommodation or modification of activities has been criticised as being lop-sided as it is essentially dominated by the Crown vision of land use.¹³⁶

3.3 Aboriginal Consent

Throughout its enunciation of these legal rules over the years, the Supreme Court of Canada has reiterated that section 35 guarantees only a process and not a particular outcome, thus, Aboriginal claimants cannot advance “absolute claims”.¹³⁷ Additionally, Aboriginal peoples are expected to set out their claims clearly to facilitate the implementation of the duty to consult.¹³⁸ The duty to consult therefore creates only an opportunity for Aboriginal peoples to present their concerns regarding potential impacts of development on their Aboriginal rights and treaty rights for consideration. Where appropriate, accommodation measures will be provided to mitigate potential impacts on Aboriginal rights or treaty rights. The duty to consult gives no right to a veto and requires no Aboriginal consent prior to carrying out a project.¹³⁹ The court held in *Haida* that “consent is appropriate only in cases of established rights, and then by no means in every case.”¹⁴⁰ The Court has subsequently recognized that Aboriginal consent is required where Aboriginal title is established, but the Crown still reserves the power to unilaterally infringe established rights. In effect, the legal rules set out on the duty to consult do not preclude the Crown from proceeding with a project where Aboriginal peoples withhold their consent.¹⁴¹

In this, the legal rules appear, in effect, to give the Crown leeway to approach consultation processes in a manner just reaching the minimal requirements. This result of the legal rules is at

¹³⁴ *Ibid* at para 47.

¹³⁵ *Taku River*, *supra* note 2 at para 2.

¹³⁶ Christie-A Colonial Reading, *supra* note 33 at 45.

¹³⁷ Robert Hamilton & Joshua Nichols, “The Tin Ear of the Court: Ktunaxa Nation and The Foundation of the Duty to Consult” (2019) 56 Alberta L Rev 729 at 730 [*Hamilton & Nichols*].

¹³⁸ *Ibid*.

¹³⁹ *Ibid* at 735

¹⁴⁰ *Haida Nation*, *supra* note 2 at 48.

¹⁴¹ *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44 at para 168 [*Tsilhqot’in Nation*]; Hamilton & Nichols, *supra* note 137 at 736.

odds with the deeper realities at issue. No matter the outcome of a consultation process, the Crown's approach to the consultation has a major role to play in building a mutual Crown-Aboriginal relation that is beneficial to both the Crown and Aboriginal peoples. Moreover, the need to support reconciliation requires the Crown to conduct itself with honour in relation to Aboriginal peoples. Where the underlying principles were that a purposive interpretation of the honour of the Crown is important to promote the ongoing process of reconciliation,¹⁴² the minimalist approach to the duty to consult set out in the various legal rules ends up in a different spot.

3.4 International Standard for Consultation

The future development of Canada's duty to consult cannot be discussed without reference to the standard of consultation in international law since the Canadian duty to consult has significant interactions with the international law norms.¹⁴³ There are a plethora of international legal instruments that safeguard the rights of Indigenous peoples,¹⁴⁴ some of which incorporate the principle of free, prior, and informed consent (FPIC). The International Labour Organization's Convention concerning Indigenous and Tribal Peoples in Independent Countries of 1989 ("ILO 169")¹⁴⁵ and *UNDRIP*¹⁴⁶ are the underpinning international instruments embodying FPIC in connection with rights of Indigenous peoples under international law. While the ILO officially introduced the principle of FPIC to protect Aboriginal peoples' rights from unnecessary removal from their traditional lands,¹⁴⁷ the *UNDRIP* is ultimately the most significant international instrument that protects the rights of Indigenous peoples.¹⁴⁸ The *UNDRIP* affirms existing Indigenous peoples' rights; it does not create new or special rights for Indigenous peoples. In

¹⁴² *Taku River*, *supra* note 2 at para 24.

¹⁴³ Newman 2014, *supra* note 25 at 142.

¹⁴⁴ Robert Goodland, "Free, Prior and Informed Consent and the World Bank Group" (2004) 4:2 Sustainable Dev L & Pol'y 67 [*Goodland*]: Goodland provides an extensive list of other international instruments that protect the rights of Indigenous peoples.

¹⁴⁵ *International Labour Organisation Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries* 1989 (adopted by the General Conference of the International Labour Organisation, Geneva, June 29, 1989; entered into force, Sept. 5, 1991).

¹⁴⁶ *UNDRIP*, *supra* note 31.

¹⁴⁷ Ginger Gibson MacDonald & Gaby Zezulka, Boreal Leadership Council, *Understanding Successful Approaches to Free Prior and Informed Consent in Canada*, Part I (2015) at 9 [*Boreal Leadership Council*].

¹⁴⁸ See generally Doyle, *supra* note 42. See also *UNDRIP*, *supra* note 31, arts 10, 11, 19, 28, 29 and 32; Mauro Barelli, "Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead" (2012) 16 Int'l J Hum Rts 1 at 9.

certain technical terms, this international instrument is perceived as not being legally binding unless it is implemented by domestic laws. The *UNDRIP*, however, could provide an important context for courts in interpreting domestic laws.

The FPIC elements in the *UNDRIP* fundamentally seek to ensure that Indigenous peoples' rights are protected. The FPIC standard has become, progressively, an aspect of the international discussion concerning resource development in Indigenous traditional territories. The discussion of FPIC for the purposes of this thesis is limited to Article 32(2) of the *UNDRIP*, which requires states to "...consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."

Although the *UNDRIP* provides for consultation with Indigenous peoples to obtain their free prior and informed consent, there are diverse views as to the legal and practical implications of the principle of FPIC in the international legal community. This thesis proceeds on a widely-held view that posits that the FPIC requirements do not afford a general veto right to Indigenous peoples, but that they require consent as the objective of consultation pursued in good faith.¹⁴⁹ This view corresponds to a purposive approach to FPIC instead of employing a formalistic interpretation exercise.¹⁵⁰

¹⁴⁹ Newman-The Oxford Handbook, *supra* note 32 at 355.

¹⁵⁰ Doyle, *supra* note 42 at 149; *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 79 (2001) at para 148; Alex Page, "Indigenous Peoples' Free, Prior and Informed Consent in the Inter-American Human Rights System" (2004) 4 Sustainable Dev L & Pol'y at 16.

3.5 The Canadian Perspective on the *UNDRIP*

After eleven years of deliberations and several revisions to the *UNDRIP*, it was finally approved by the United Nations General Assembly.¹⁵¹ In 2007, *UNDRIP* was adopted by an overwhelming majority vote.¹⁵² The United States, Canada, Australia, and New Zealand voted against the *UNDRIP*.¹⁵³ Canada expressed concerns with the provisions in the *UNDRIP* that it considered inconsistent with the existing Aboriginal rights guaranteed by section 35 of the *Constitution Act, 1982*.¹⁵⁴ Canada explained that the FPIC principle and other provisions in the *UNDRIP* “might call into question the finality of Canada’s existing Aboriginal treaties and land claims agreements.”¹⁵⁵ There has since been a reversal of the opposing stance taken by Canada and the three other countries.¹⁵⁶

In 2010, Canada officially endorsed the *UNDRIP* as an indication of its commitment to strengthen its partnership with Aboriginal peoples to build Canada.¹⁵⁷ At that time, Canada emphatically described the *UNDRIP* as aspirational and not legally binding.¹⁵⁸ This assertion has since been contested as being Janus-faced because “states never perceived the provisions of the *Declaration* as mere aspirations or they would not have been so active in its elaboration.”¹⁵⁹

All the same, at the 15th Session of the United Nations Permanent Forum on Indigenous Issues held in New York City in May 2016, the federal minister of Indigenous and Northern Affairs,

¹⁵¹ See generally Ken Coates & Blaine Favel, *Understanding FPIC: From Assertion to Assumption on Free, Prior and Informed Consent to a New Model for Indigenous Engagement on Resource Development* (Ottawa: Macdonald-Laurier Institute, 2016) [Coates & Favel]; Cesar Rodriguez-Garavito, “Human Rights-Latin America, Indigenous Peoples-Latin America, Neoliberalism Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields”, (2011) 18 *Indiana J Glob Leg Stud.* 263, at 287; Shalanda H. Baker, “Why the IFC’s Free Prior and Informed Consent Policy Doesn’t Matter (Yet) to Indigenous Communities Affected by Development Projects” (2013) 30 *Wisconsin Int’l LJ* 677 [Baker].

¹⁵² Brenda L. Gunn, “Overcoming Obstacles to Implementing the UN Declaration on the Rights of Indigenous Peoples in Canada” (2013) 31 *Windsor YB Access Just* 147 at 151 [Gunn]; Doyle, *supra* note 42 at 106.

¹⁵³ Newman 2014, *supra* note 25 at 150; Coates & Favel, *supra* note 151 at 9; Baker, *supra* note 151 at 677; UN News, *The United Nations Adopts Declaration on Rights of Indigenous Peoples*, (Sept. 13, 2007), online: <http://www.un.org/apps/news/story.asp?NewsID=23794> (accessed April 12, 2018).

¹⁵⁴ Frank Iacobucci, et al, *Free, Prior and Informed Consent in Canada: Towards a New Relationship with Indigenous Peoples* (Toronto: Torys LLP, 2016) at 16.

¹⁵⁵ *Ibid* at 16-17; Gunn, *supra* note 152 at 151.

¹⁵⁶ Gunn, *ibid* at 152; Baker, *supra* note 151 at 677.

¹⁵⁷ Coates & Favel, *supra* note 151 at 10.

¹⁵⁸ Newman 2014, *supra* note 25 at 150.

¹⁵⁹ Xanthaki, *supra* note 39 at 36. See also Gunn, *supra* note 152 at 155-59.

Carolyn Bennett, declared Canada's full support of *UNDRIP*.¹⁶⁰ Canada's complete support for *UNDRIP* signifies an important advancement toward reconciliation, but many challenges lie ahead of implementing the commitment. It bears noting that a private member's bill (C-262), which could have led to a statutory implementation of the *UNDRIP* in Canada, got to third reading in the Senate in June 2019.¹⁶¹ But it was not passed into law before the legislative session ended.¹⁶²

While the principle of FPIC in *UNDRIP* is not a legal requirement in Canada, the Supreme Court has developed a jurisprudence on the duty to consult and accommodate Aboriginal peoples when their rights might be adversely impacted by Crown decisions. Some writers on the FPIC concept posit that *UNDRIP* should function as a guide for Canadian courts in interpreting provisions in domestic legislation that are in themselves ambiguous.¹⁶³ In *Sackaney v. The Queen*,¹⁶⁴ the court held that although *UNDRIP* has been endorsed by Canada, being not ratified by Parliament, it is consequently not legally binding. While *UNDRIP* may influence contextual approaches to statutory interpretation, the courts will tend to hold that it does not give any substantive rights in Canada.¹⁶⁵ In *Simon*, the court states that while the Court may consider interpretations that represent *UNDRIP*'s values, the courts will not accept arguments relying on *UNDRIP* as creating substantive rights or altering the duty to consult and accommodate.¹⁶⁶ The Yukon Supreme Court in *Taku River Tlingit First Nation v. Canada (Attorney General)*, among others, leaves room for more possibilities for interpretation informed by *UNDRIP*'s values.¹⁶⁷ The court held

¹⁶⁰ Isaac, *supra* note 26 at 59; Martin Papillon & Thierry Rodon, "Environmental Assessment Processes and the Implementation of Indigenous Peoples Free, Prior and Informed Consent Report to the Expert Panel Reviewing Federal Environmental Assessment Processes" (December, 2016) at para 1.1 [*Papillon & Rodon-EAP*].

¹⁶¹ Bill C-262, An Act to Ensure the Laws of Canada are in Harmony with the United Nations Declaration on the Right of Indigenous Peoples, 42nd Parl., 1st Sess.m 2016 (as passed by the House of Commons 21 April 2016).

¹⁶² Parliament of Canada, Legisinfo, *Private Member's Bill*,

online: <https://www.parl.ca/LegisInfo/BillDetails.aspx?Bill=C262&Language=E&Mode=1&Parl=42&Ses=1>

¹⁶³ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 70; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 SCR 176, at para 63. See generally *R. v. Hape*, 2007 SCC 26, [2007] 2 SCR 292.

¹⁶⁴ *Sackaney v. The Queen*, [2013] TCC 303 at para 35.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Simon v. Canada (Attorney General)*, 2013 FC 1117 at para 121; Grace Nosek, "Re-Imagining Indigenous Peoples' Role in Natural Resource Development Decision-Making- Implementing Free Prior and Informed Consent in Canada through Indigenous Legal Traditions" (2017) 50 UBC Law Review 95 at 147; *Hupacasath First Nation v. Canada (Foreign Affairs)*, 2013 FC 900 at para 51; *Nunatukavut Community Council v. Canada*, [2015] F CJ No. 969 (FC) at paras 103-104.

¹⁶⁷ *Taku River Tlingit First Nation v. Canada (Attorney General)*, 2016 YKSC 7 at para 100.

that while *UNDRIP* does not have any force of law in Canada, it is useful for a favourable interpretation of Canada's Constitution.

Essentially, the *UNDRIP* (or even non-ratified treaties) cannot form part of Canadian law unless and until legislated upon.¹⁶⁸ However, in what seems like a glimmer of hope that Canadian courts may shift from this position, Dwight Newman put forward the view that to the extent that *UNDRIP* is considered *aspirational*, it could progressively influence the courts.¹⁶⁹ Chapters 4 and 5 of this thesis will develop an approach to the duty to consult that follows the underlying legal principle of reconciliation and fits with the *UNDRIP* norms on FPIC.

3.6 Conclusion

The duty to consult and accommodate is a legal requirement to engage potentially affected Aboriginal communities when the Crown contemplates activities that will affect the communities. The duty to consult has undergone significant development. In *Sparrow*, it was part of the justified infringement analysis only. The *Haida Nation* trilogy of cases established the legal doctrine of duty to consult and where appropriate, accommodate Aboriginal peoples in every instance in advance of a Crown decision that might affect Aboriginal or treaty rights. In *Clyde River* and *Chippewas of the Thames*, the Supreme Court of Canada analyzed the meaningful discharge of the duty by an administrative body or regulatory agency, which could be applied to the context of nuclear regulation (and it would be possible to say more on the details of nuclear regulation and the duty to consult—an Appendix to this thesis sets out more details). But all of these legal rules leave the possibility that the Crown can fulfill consultation duties in minimalist ways, thus setting up a framework of rules that depart from the underlying principle of reconciliation.

Under international law, the duty to consult with Indigenous peoples is also a requirement, which is set out in ILO 169 and the *UNDRIP*, and this thesis has referred to the latter as a key international instrument that Canada has endorsed. The *UNDRIP* does not itself have binding force, but it can influence the courts in interpreting domestic laws. While the legal duty to

¹⁶⁸ Newman 2014, *supra* note 25 at 146.

¹⁶⁹ *Ibid* at 151.

consult is intended to protect Aboriginal and treaty rights with the fundamental aim of achieving reconciliation between Aboriginal and non-Aboriginal society, the current structure of the constitutional duty does not live up to the promise of reconciliation. The conception of FPIC in *UNDRIP* can offer inspiration in interpreting the constitutional duty to consult, while reaching alignment with the underlying Canadian principles.

Chapter 4: Towards Reconciliation: Assessing the Fundamental Objective of Section 35

4.0 Introduction

The role of reconciliation in Canada's politics concerning Crown-Aboriginal relationships is difficult to overemphasize. Canada has developed a judicially motivated jurisprudence of reconciliation in interpreting section 35.¹⁷⁰ The Supreme Court of Canada has frequently acknowledged the use of the duty to consult as a legal instrument to meet the end of reconciliation.¹⁷¹ Indeed, in *Little Salmon/Carmacks First Nation*, the Court held that "the reconciliation of Aboriginal and non-Aboriginal peoples in a mutually respectful long-term relationship is the grand purpose of section 35 of the *Constitution Act, 1982*."¹⁷² Section 35, and the doctrines associated with it, should be interpreted in line with this purpose.¹⁷³

Writing in a scholarly context on the concept of reconciliation, Mark Walters has conceived reconciliation in three forms: reconciliation as resignation, reconciliation as consistency, and reconciliation as relationship. Walters suggests reconciliation as part of legality and describes it as a process of restoring the strained relationship between people.¹⁷⁴ He argues that it requires a level playing field for the parties involved. Reconciliation in this context refers to peoples reconciling to restore relationship.¹⁷⁵ Walters argues that a meaningful reconciliation of Aboriginal and non-Aboriginal societies would consider "jurisprudence of reconciliation as an inter-societal concept," taking into account Aboriginal perspectives on reconciliation.¹⁷⁶

According to Walters, a relational form of reconciliation is relatively two-sided and has an inherent moral worth attached to it.¹⁷⁷ It involves two parties reconciling to resolve their differences and re-establish an amicable relationship. A real sense of reconciliation includes genuine "acts of mutual respect, tolerance, and goodwill that serve to heal rifts and create foundations for [a] harmonious relationship."¹⁷⁸ Walters articulates "a morally rich sense of

¹⁷⁰ Walters-The Jurisprudence of Reconciliation, *supra* note 38 at 166.

¹⁷¹ *Mikisew Cree*, 2018, *supra* note 3; *Chippewas of the Thames*, *supra* note 30; *Clyde River*, *supra* note 30.

¹⁷² *Little Salmon*, *supra* note 110 at para 10.

¹⁷³ See generally *Sparrow*, *supra* note 94.

¹⁷⁴ Walters-The Jurisprudence of Reconciliation, *supra* note 38 at 166.

¹⁷⁵ *Ibid* at 167.

¹⁷⁶ *Ibid* at 190.

¹⁷⁷ The other forms of reconciliation as recognized by Walters are: "reconciliation as consistency" and "reconciliation as resignation".

¹⁷⁸ Walters-The Jurisprudence of Reconciliation, *supra* note 38 at 168.

reconciliation,” as that which would help to re-establish a sense of self-respect and peace between Nations once at odds.¹⁷⁹

In contexts beyond the courts, the Royal Commission on Aboriginal Peoples endorsed the concept of reconciliation in 1996.¹⁸⁰ In 2015, the concept resurfaced in the Truth and Reconciliation Commission’s (TRC) Final Report.¹⁸¹ According to the TRC, “reconciliation is about establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country.” It is an ongoing process aimed at creating and upholding respectful inter-societal relationships through concrete engagements “that demonstrate real societal change.” Furthermore, the TRC recommended revitalization of Aboriginal law and legal traditions, which in itself creates respectful relationships.¹⁸²

No doubt, Canada’s reconciliation processes were born out of broader needs to consider and attempt to resolve Aboriginal historical grievances and the current socio-economic conditions facing Aboriginal communities and individuals. In many ways, Aboriginal communities are yet to see the positive impact of reconciliation in the area of duty to consult. Aboriginal communities have struggled for the recognition and protection of their constitutionally recognized rights. They have commenced legal actions against government and industry, or in some cases engaged in direct demonstrations against or disruption of projects, amongst various forms of civil disobedience.¹⁸³ Reconciliation as a relationship between Aboriginal and non-Aboriginal societies in Canada is imperative to address these concerns and to ensure stability within Canada.

The Supreme Court of Canada states in *Haida Nation* that a reconciliation process stems from Aboriginal rights guaranteed under s. 35(1) of the Constitution. It is a process that flows from the Crown’s duty of honourable dealing toward Aboriginal peoples.¹⁸⁴ The duty to consult as

¹⁷⁹ *Ibid* at 167-170.

¹⁸⁰ Ariss et al, *supra* note 36 at 11 (noting that the Royal Commission on Aboriginal Peoples recommended that Canada engage Aboriginal peoples as nations as it “would pave the way for genuine reconciliation and enable Aboriginal people to embrace with confidence dual citizenship in an Aboriginal nation and in Canada”).

¹⁸¹ Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward Looking Back*, vol 1 (Ottawa: Indian and Northern Affairs Canada, 1996) at 523; Truth and Reconciliation Commission of Canada, “Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada” (2015) at 16 [*TRC Summary Report*].

¹⁸² *Ibid* at 6.

¹⁸³ Wapshkaa Ma’iingan (Aaron Mills), “Aki, Anishinaabek, Kaye tahsh Crown” (2010) 9 Indigenous LJ 107.

¹⁸⁴ *Haida Nation*, *supra* note 2 at para 32.

presently structured appears to establish an approach that ultimately requires minimal legal duties. This chapter argues that without embracing a genuine reconciliatory attitude that pays attention to the quality of Crown-Aboriginal relationships, the purpose of section 35 will not be achieved. This chapter uses the Supreme Court's account of reconciliation from *Van der Peet* to direct the discussion of reconciliation—the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty.¹⁸⁵ This chapter approaches the question of reconciliation in the light of the conception of reconciliation advanced by McLachlin J. (as she then was) in her separate opinion in that case. Consistent with McLachlin J.'s view, this thesis argues that to achieve reconciliation, the legal perspectives of both non-Aboriginal and Aboriginal societies should be incorporated and that full recognition must be given to the pre-existing Aboriginal tradition.¹⁸⁶ This account of reconciliation should continue to influence the duty to consult. Therefore, future consultation processes should be treated as a site for ongoing reconciliation rather than a procedural box to be checked. A procedural requirement that merely meets the judicially formulated rules could frustrate the purpose of section 35. Put differently, a minimalistic/formalistic approach to reaching the requirements of the duty to consult does not promote reconciliation and is thus ultimately inconsistent with *Haida Nation* itself.

4.1 Reconciliation as the Main Objective of Section 35

While enunciating the reason underlying the Aboriginal rights protected in section 35(1), it was held that when the Court identifies the purpose of a provision in the constitution or recognizes the interests which the provision is supposed to protect, the Court is clarifying the basis of the provision. That is, it is stating the reasons behind the protection given by section 35. Therefore, the Court must “explain the rationale and foundation of the recognition and affirmation of the special rights of [A]boriginal peoples; it must identify the basis for the special status that [A]boriginal peoples have within Canadian society as a whole.”¹⁸⁷ The Supreme Court linked the duty to consult and accommodate to the purpose of reconciliation. The Supreme Court states that

¹⁸⁵ *Mikisew Cree*, 2018, *supra* note .

¹⁸⁶ *Van der Peet*, *supra* note 4.

¹⁸⁷ *Van der Peet*, *ibid* at para 27.

the duty to consult and accommodate imposes an obligation on the Crown to consult Aboriginal peoples when the Crown contemplates decisions that may have potential impacts on Aboriginal or treaty rights. The procedural duty is founded in section 35, and in all, should provide a basis for the articulated purpose of section 35.

4.1.1 Doctrinal Shift in the Courts' Understanding of the Reconciliation

It is seemingly a common understanding of the Court that reconciliation is the overarching purpose of section 35, but the Court's interpretation of reconciliation has undergone numerous changes.¹⁸⁸ The Court's initial consideration of the purpose of reconciliation occurred in the *Sparrow* decision, where the Court introduces an infringement test.¹⁸⁹ The Court's understanding of reconciliation in *Sparrow* is that the federal government is required to justify the Crown's infringement on constitutionally protected Aboriginal rights.¹⁹⁰ The Court held that "federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies [A]boriginal rights."¹⁹¹

In *Van der Peet*, the court interpreted reconciliation as the purpose of section 35. The court held that section 35(1) offers the constitutional basis for reconciliation of the "pre-existing [A]boriginal claims to the territory that now constitutes Canada, with the assertion of British sovereignty over that territory, to which the recognition and affirmation of [A]boriginal rights in s.35 (1) is directed."¹⁹²

In *R v Gladstone*,¹⁹³ the Court adopted the interpretation in *Van der Peet* but held that some limitations on Aboriginal rights would be justifiable based on reconciliation in order to balance Aboriginal claims with the interests of the the rest of Canadian society. Michael McCrossan

¹⁸⁸ Michael McCrossan, "Shifting Judicial Conceptions of Reconciliation: Geographic Commitments Underpinning Aboriginal Decisions" (2013) 31 Windsor YB Access Just 155 [McCrossan]; Alan Hanna, "Reconciliation Through Relationality in Indigenous Legal Orders" (2019) 56 Alberta L Rev 817.

¹⁸⁹ See generally *Sparrow*, *supra* note 94.

¹⁹⁰ D'Arcy Vermette, "Dizzying Dialogue: Canadian Courts and the Continuing Justification of the Dispossession of Aboriginal Peoples" (2011) 29 Windsor YB Access Just 55 at 59 [Vermette].

¹⁹¹ *Sparrow*, *supra* note 94 at para 62.

¹⁹² *R v. Gladstone*, [1996] 2 SCR 723 at para 73 [Gladstone]; *Van der Peet*, *supra* note 4 at para 36, 42.

¹⁹³ *Gladstone*, *ibid.*

notes that the Court altered its interpretation of reconciliation, justifying additional limitations on Aboriginal rights based on grounds of public interest.¹⁹⁴ It is notable that the dissenting opinion of McLachlin J. (as she then was) on the conceptualization of reconciliation shows a significant deviation from Chief Justice Lamer's understanding and application of reconciliation. Justice McLachlin states that the preferable way to achieve reconciliation is through negotiation and negotiated agreement- it cannot be achieved through unilateral diminishment of Aboriginal peoples' rights.¹⁹⁵ This view seems more consistent with the spirit of section 35 regarding Crown-Aboriginal relationships.

Since *Sparrow*, *Van der Peet*, and *Gladstone*, the Supreme Court's articulations of reconciliation have continued to take different forms.¹⁹⁶ Due to space limitations, this research will briefly mention the Supreme Court's decisions relating to the conception of reconciliation at this point. In *Delgamuukw* and *R v. Marshall*, the Court upheld the understanding of reconciliation in *Gladstone*, that is, a concept of reconciliation that could create limitations on Aboriginal peoples' rights, and expanded it to Aboriginal title.¹⁹⁷ In *Haida Nation*, *Taku River*, and *Mikisew Cree*, the Court returned to the concept of reconciliation as the overarching objective of section 35 and highlighted the significant role it plays in reconciling Aboriginal societies and non-Aboriginal society.¹⁹⁸ In *Haida Nation*, the Court held that reconciliation is a process "flowing from the rights guaranteed by section 35 of the *Constitution Act*."¹⁹⁹

In the recent cases of *Chippewas of the Thames* and the companion case of *Clyde River*, the Court affirmed the role of the duty to consult in furthering reconciliation between the Crown and Aboriginal peoples, the purpose of section 35.²⁰⁰ In the more recent case of *Mikisew Cree*, 2018 the Court puts it succinctly:

[T]he ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Indigenous societies with the assertion of Crown sovereignty... Reconciliation is the

¹⁹⁴ *Ibid*; McCrossan, *supra* note 188 at 174; See also Gordon Christie, "Judicial Justifications in Recent Developments in Aboriginal Law" (2002) 17 CJLS 41.

¹⁹⁵ Kent McNeil, "Reconciliation and the Supreme Court: The Opposing Views of Chief Justice Lamer and McLachlin" (2003) 2 Indigenous LJ 1 at 3 [McNeil]; *Haida Nation*, *supra* note 2 at para 14.

¹⁹⁶ See for example, *Mitchell v. Canada (Minister of National Revenue)*, [2001] 1 SCR 911; *Little Salmon*, *supra* note 110.

¹⁹⁷ McNeil, *supra* note 194 at 19.

¹⁹⁸ *Mikisew Cree*, *supra* note 2 at para 50.

¹⁹⁹ *Haida Nation*, *supra* note 2 at para 32.

²⁰⁰ *Clyde River*, *supra* note 30 at para 19. See generally, *Chippewas of the Thames*, *supra* note 30.

“fundamental objective of the modern law of aboriginal and treaty rights”... The purpose of s. 35 of the *Constitution Act, 1982*, is to facilitate this reconciliation.

The Court held further that the duty to consult, a “valuable adjunct” of the honour of the Crown, plays an essential role in the ongoing process of reconciliation. To facilitate reconciliation between the Crown and Aboriginal peoples, the duty to consult requires the Crown to act honourably in ways that protect section 35 rights. According to the Supreme Court of Canada, the “endeavour of reconciliation is [the] first principle of Aboriginal law.”²⁰¹

In *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*,²⁰² the majority of the Court held that, while the hope of consultation is reconciling Aboriginal and non-Aboriginal interests, this may not be possible in some cases.²⁰³ The decision, according to Hamilton and Nichols, not only reverses judicial precedents set in the duty to consult case law, but it also creates a “foundational failure of Section 35.”²⁰⁴ In this way, the Court appears to generate a misunderstanding of its previously stated position regarding reconciliation as the fundamental objective of section 35. The position stated consistently in earlier case law was that the purpose of section 35 is the reconciliation of the Crown’s asserted sovereignty and Aboriginal interests.²⁰⁵ It was also stated again in *Mikisew Cree*, 2018. The statements in *Ktunaxa* are an outlier and should not be considered to take away from the general arc of the case law.

The process of reconciliation presents much potential if the Crown is committed to meaningfully negotiating and addressing historical grievances. The duty to consult is an essential aspect of Canadian law that seeks to reconcile Crown sovereignty with pre-existing Aboriginal claims. However, the jurisprudence seems to be implemented in a manner that is sometimes inconsistent with reconciliation. The Canadian government will only be fulfilling its promise of reconciliation under section 35 if the Crown approaches consultation with the intent to reach an agreement. This position flows from a larger set of arguments.

²⁰¹ *Mikisew Cree*, 2018, *supra* note 3 at para 22, 26, 58, 61.

²⁰² *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 [*Ktunaxa Nation*].

²⁰³ *Ibid* at para 83.

²⁰⁴ Hamilton & Nichols, *supra* note 137 at 730, 736.

²⁰⁵ *Haida Nation*, *supra* note 2 at para 32; Hamilton & Nichols, *ibid* at 736.

By way of background reminder, in *Sparrow*, the Court's decision seems to confront unilateral historical actions taken by the Crown, stating that those actions would no longer be covered by judicial immunity.²⁰⁶ However, the Court has restated that section 35 does not guarantee a specific outcome; thus, Aboriginal claimants cannot advance "absolute claims."²⁰⁷ As developed in the rules stated in later case law, the duty to consult gives no right to a veto and requires no Aboriginal consent before carrying out a project.²⁰⁸ In effect, the duty to consult does not preclude the Crown from proceeding with a project where Aboriginal peoples withhold their consent.²⁰⁹ The Supreme Court conceptualizes reconciliation such that it does not obligate the Crown to obtain Aboriginal consent. The Court's conception merely creates a regime that places limitations on the Crown's administrative authority.²¹⁰

In this, the law seems to give the Crown the ability to approach consultation processes in a manner aimed only at the minimal requirements. In *Mikisew Cree*, 2018, a case which came after *Ktunaxa Nation*, the Court specified that "the principle of reconciliation and not rigid formalism should drive the development of Aboriginal law."²¹¹ *Ktunaxa Nation* was a bit of a misunderstanding of the previous decisions regarding the concept reconciliation. This misunderstanding appears to have been corrected in *Mikisew Cree*, 2018, which came after *Ktunaxa Nation*. No matter the outcome of a consultation process, the Crown's approach to consultation has a significant role to play in building a mutual Crown-Aboriginal relation that is beneficial to them. Moreover, the need for reconciliation gives rise to the Crown having to conduct itself with honour in dealing with Aboriginal peoples. More so, courts have held that a purposive interpretation of the honour of the Crown is vital to promote the ongoing process of reconciliation.²¹²

Thus, reconciliation is an on-going process that breathes life to an anticipation of a favourable outcome. Reconciliation of Aboriginal and non-Aboriginal societies is that which places the legal values of both societies at equal weight. It frames a model of consultation that positions the

²⁰⁶ McCrossan, *supra* note 188 at 158.

²⁰⁷ Hamilton & Nichols, *supra* note 137 at 730.

²⁰⁸ *Ibid* at 735; *Haida Nation*, *supra* note 2 at para 48.

²⁰⁹ Hamilton & Nichols, *ibid* at 736.

²¹⁰ Robert Hamilton, "Uncertainty and Indigenous Consent: What the Trans-mountain decision tells us about the current state of the Duty to Consult." (September 10, 2018), online: ABlawg, <http://ablawg.ca/wp-content/uploads/2018/09/Blog_RH_TMX_Sept2018.pdf> (accessed 26 August, 2019) at 3 [Hamilton].

²¹¹ *Mikisew Cree*, 2018, *supra* note 2 at para 44.

²¹² *Taku River*, *supra* note 2 at para 24.

Crown and Aboriginal societies in a nation-to-nation relationship while revitalizing Aboriginal protection under the constitution. It consists of mutually established flexible processes through which decisions and authorities are reconciled to support the relationship between Aboriginal and non-Aboriginal societies and to effectively resolve disputes that may arise.

4.1.2 Honourable Dealing

The Supreme Court has recognized that the duty to consult stems from the purpose of reconciliation. In line with this, the Supreme Court of Canada gave a purposive interpretation of section 35. In *Haida Nation*, the Court stated that the “duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations.”²¹³ In its decision in *Van der Peet*, the Court referred to the scholarship of Walters, which indicates that true reconciliation will consider the Aboriginal perspective as well as the common law perspective, placing equal weight on both.²¹⁴ Indeed, Walters stated, “a morally and politically defensible conception of [A]boriginal rights will incorporate Canadian Aboriginal and non-Aboriginal legal perspectives.”²¹⁵ The Supreme Court of Canada seemingly worked with Walters’s claim on reconciling Aboriginal legal traditions and common law.

However, it has also been contended that Walters’s assertion appears to have been weakened by the Court’s use of the expressions “Aboriginal *perspective*” and “common *law*” in developing Aboriginal rights in a manner that elevates the common law concepts while excluding Aboriginal legal principles.²¹⁶ On a cynical view, the Court has thus effectively held that it is not appropriate to apportion equal weight to both Aboriginal and non-Aboriginal perspectives. The Aboriginal perspective must be structured in terms recognizable under the Canadian legal framework.²¹⁷

²¹³ *Haida Nation*, *supra* note 2 at para 14.

²¹⁴ *Van der Peet*, *supra* note 4 at paras 50, 30-31.; See also Mark Walters “British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*” (1992) 17 Queen’s LJ 350 at 413.

²¹⁵ *Van der Peet*, *ibid* at para 50.

²¹⁶ Kirsten Manley-Casimir, “Reconceiving the Duty to Consult and Accommodate Aboriginal Peoples: A Relational Approach” (University of British Columbia PhD Thesis, Vancouver, 2016) at 53 [*Manley-Casimir*].

²¹⁷ See generally *Van der Peet*, *supra* note 3.

The manner in which the Supreme Court articulated reconciliation seems to create a significant degree of privileging of the common law over Aboriginal laws. The court conceptualizes an approach to reconciliation that limits Aboriginal perspectives, requiring that Aboriginal rights under section 35 be structured such that they are in conformity with the Canadian legal framework. This, therefore, indicates that Aboriginal claims have to be structured in a way that is recognized by the Canadian courts. This approach does not consider whether a structuring of Aboriginal values or relationships to their traditional land in a way that is consistent with the Canadian legal framework exerts pressure on the Aboriginal legal structure. The Court failed to give authority to the Aboriginal legal regime, limiting the possibility of achieving reconciliation, the purpose of section 35.

Regardless of the attempt to recognize Aboriginal values and laws, section 35 largely stems from common law and non-Aboriginal vision of land rights. Where the common law serves as the ultimate process for measuring Aboriginal legal values, it essentially guarantees that non-Aboriginal values predominate even within section 35.²¹⁸ This conception gives a prerogative to non-Aboriginal legal perspective and also elevates non-Aboriginal interpretation of Aboriginal and treaty rights. Section 35 should function as a tool to end Aboriginal struggle to protect their Aboriginal and treaty rights. It is expected that section 35 will resolve the historical rules that privilege non-Aboriginal vision for the interpretation of the Aboriginal and treaty rights. However, it appears that Aboriginal peoples have continued in the struggle to protect their rights, and the “new rules of the game increasingly look like the old rules. After some initial promises, the common law as applied within section 35 seems to be collapsing back into itself and interpreting Aboriginal and treaty rights through non-Aboriginal categories and principles.”²¹⁹

The approach explained above seems to curtail the potential of achieving the aim of section 35 as it creates domination in the process of reconciliation between diverse cultures.²²⁰ Vermette argues that this approach pays more attention to the common law, requiring Aboriginal legal traditions to accommodate the common law, the assertion of sovereignty, and the needs of the

²¹⁸ John Borrows, “Living Law on a Living Earth” in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 161 at 177.

²¹⁹ *Ibid* at 178.

²²⁰ Vermette, *supra* note 190 at 65.

broader society.²²¹ Vermette's position lends credence to the argument that the failure to give equal legal weight to both legal perspectives will always require that Aboriginal peoples do all the reconciling.²²² The approach that requires Aboriginal peoples to do all the reconciliation falls within a different conception of reconciliation – "reconciliation as resignation."²²³ Walters describes that approach as asymmetrical, requiring Aboriginal peoples to resign to the given circumstances that may not change, leaving Aboriginal peoples in the lurch. On this conception, Aboriginal peoples, therefore, are to adjust their expectations according to the Crown's idea of how their traditional territories should be used.²²⁴ This, therefore, raises the question: where lies the honour of the Crown in the reconciliation process? The Crown makes the policies that tend towards reconciliation without taking into account Aboriginal legal principles. Additionally, the Crown analyzes and implements these policies through the personnel involved in the process of duty to consult acting on behalf of the Crown.

It has been said earlier that the honour of the Crown has been established as a constitutional principle and an essential anchor in this area of reconciliation.²²⁵ The Crown is required to conceive an honourable approach to reconciliation. Historically, the foundation of the principle of the honour of the Crown suggests that it must be construed liberally to mirror the basic realities from which it arises. According to the Supreme Court of Canada, the principle of "[t]he honour of the Crown gives rise to different duties in different circumstances."²²⁶ The Court held that if we must achieve reconciliation between the Crown and Aboriginal societies, the Crown must act honourably regarding all its transactions with Aboriginal peoples.²²⁷

Furthermore, *Haida Nation* significantly supports the argument that reconciliation stems from rights guaranteed by section 35(1). The Court held that the "process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the

²²¹ *Ibid* at 61.

²²² *Ibid*.

²²³ Walters—The Jurisprudence of Reconciliation, *supra* note 38 at 167.

²²⁴ *Ibid* at 167; Christie-Developing Case Law, *supra* note 33 at 16 (noting that the Crown still has the right to make the fundamental decisions about how lands are to be used).

²²⁵ *Little Salmon*, *supra* note 110 at para 42.

²²⁶ *Haida Nation*, *supra* note 2 at para 18.

²²⁷ *Ibid*, at para 17; *Delgamuukw*, *supra* note 116 at para 186.

Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.”²²⁸

Also, the Court has analyzed reconciliation such that it makes the Crown obligated to consult honourably with the Aboriginal groups who, in the context of treaties right, have paid “dearly for their entitlement...”²²⁹ Surrendering of the Aboriginal interest certainly is a “hefty purchase price” and requires not less than honourable conduct; otherwise, mitigation measures adopted through an inadequate process would limit rather than foster the process of reconciliation.²³⁰ Therefore, the honour of the Crown should become the catchphrase of government officials consulting on behalf of Crown to implement the duty to consult towards reconciliation.

True reconciliation requires the actual implementation of the duty to consult towards achieving reconciliation. Also, Canada must be thinking seriously towards achieving this goal because failure to do so will only be a reminder of past grievances.²³¹ Aboriginal peoples should not even fight so much to sustain their rights, taking action against the Crown or engaging in civil disobedience. In *Delgamuukw*, the court linked reconciliation to the Crown's duty of good faith in negotiating with Aboriginal groups. The court held that the “best approach ... is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake.”²³² Correspondingly, the Crown acting honourably should be able to genuinely negotiate with Aboriginal groups to fulfill the purpose of reconciliation.

4.2 The Limits of the Duty to Consult as a Procedural Requirement for Meeting the Reconciliation Objective

The goals and the underlying objectives associated with the duty to consult appear inspiring. It has been explained earlier that the duty to consult and accommodate is developed as a significant legal instrument to foster reconciliation in the area of Crown-Aboriginal relations with respect to Aboriginal and treaty rights.

²²⁸ *Ibid* at para 32.

²²⁹ *Mikisew Cree*, *supra* note 2 at para 52.

²³⁰ *Ibid* at para 68.

²³¹ S.J. Rombouts, *Having a Say: Indigenous Peoples, International Law and Free, Prior and Informed Consent* (Oisterwijk: Wolf Legal Publication, 2014) at 397 [Rombouts].

²³² *Delgamuukw*, *supra* note 116 at para 207.

However, the Court’s articulation of the legal rules on this duty may not present opportunities for Aboriginal peoples to make decisions about how they wish to use their traditional territories. More so, the Supreme Court enunciated accommodation as requiring “compromise” to balance conflicting interests and “good faith efforts to understand each other’s concerns and move to address them.”²³³ The Supreme Court highlighted the need to balance competing interests with Aboriginal and treaty rights for the purpose of reconciliation, reducing the potential for accommodation. In practice, accommodation measures seem to result in minor modifications to government actions, creating a substantial burden on Aboriginal peoples.²³⁴

This section points towards practical challenges around the practical implementation of the duty to consult, which seem to make it difficult to achieve meaningful engagement and advance the constitutional goal of reconciliation. These issues bear the risk of minimizing the potential for meaningful consultation, and they threaten the possibility of reconciliation and building long term Crown-Aboriginal relation, again illustrating that the legal rules enunciated on the duty to consult and functioning in practice have failed to line up with its purposes.

4.2.1 Failure to Manage Cumulative Effects

The cumulative impact of projects on Aboriginal communities is one of the complex issues to deal with in the consultation process. In spite of the complexities, the court has held that the Crown is expected to always honourably “work with Aboriginal peoples in a spirit of reconciliation to consider the cumulative effects of projects in the consultation process.”²³⁵ SMR project activities may involve several minimal and independent actions considered to be individually insignificant.²³⁶ But, over time and space, these small activities could result in significant and permanent adverse impacts in the environment. Since gradual changes are

²³³ *Haida Nation*, *supra* note 2 at para 49.

²³⁴ Manley-Casimir, *supra* note 216 at 91.

²³⁵ *Prophet River First Nation v. Canada (Attorney General)*, 2017 FCA 15 at para 61.

²³⁶ Chris Tollefson & Karen Wipond, “Cumulative Environmental Impacts and Aboriginal Rights” (1998) 18 *Env’l Impact Assessment Rev* 371 at 372.

minimal, the effects often remain insignificant and ignored until the cumulative effects are found to be of a more significant magnitude.²³⁷

The duty to consult is not activated by historical impacts; it is not the vehicle to address past grievances.²³⁸ The duty to consult is also limited to the negative impacts from the particular decision by the Crown. But, it may be difficult to understand the magnitude of the impact of a project on the ability of Aboriginal peoples to carry on their constitutionally guaranteed rights without considering the larger context.²³⁹ Thus, cumulative impacts of an ongoing project and past context may be relevant in assessing the scope of the duty to consult.²⁴⁰

Some Aboriginal peoples are concerned that their rights are being compromised gradually by numerous decisions on project development, which have strained their ability to exercise their rights.²⁴¹ This practically constitutes a threat to consultation processes on resource development. While proponents are focused on the additional incremental impacts of their projects, “Aboriginal groups are often thinking about how past, present and future development have or will impact their communities and the ability to exercise their asserted or established rights.”²⁴²

Of meaningful concern here is that assessment of cumulative effects involves a lot of challenging considerations, requiring meaningful time.²⁴³ Proponents prefer that projects are approved, paying minimal costs concerning environmental protection, but Aboriginal peoples demand that concerted attention be paid to the long-term effect of project activities on their constitutional rights.²⁴⁴ Things will be problematic if project proponents do only what they *must* to get projects

²³⁷ *Ibid* at 372.

²³⁸ *Chippewas of the Thames*, *supra* note 30 at para 41; see also Newman-The Oxford Handbook, *supra* note 32 at 359.

²³⁹ *Ibid* at para 41; Jack Woodward, *Native Law* (loose-leaf), vol. 1, at 5-107, 5-108.

²⁴⁰ *Chippewas of the Thames*, *supra* note 30 at para 42; *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, 18 BCLR (5th) 234 at para 117.

²⁴¹ See generally, Gray-INAC Report, 2016, *supra* note 6.

²⁴² *Ibid*.

²⁴³ Peter Duinker & Lorne A. Greig, “The Importance of Cumulative Effects Assessment in Canada: Ailments and Ideas of Redeployment” (2006) 37 *Env’t Management* 153 at 156 [*Duinker & Greig*]; See generally, Sam Adkins et al, “Calculating the Incalculable: Principles for Compensating Impacts to Aboriginal Title” (2016) 54 *Alberta L Rev* 351.

²⁴⁴ See for example CNSC-SON Submission April 23, 2018, *supra* note 93 at 3. The case suggests that Bruce Power was uneasy about having to expend the significant cost related to mitigation measures.

approved, that is to say, “minimising effort concerning cumulative effects.”²⁴⁵ Aboriginal groups fear that the cumulative effect of various Crown authorizations of resource developments and other activities result in the deprivation of their constitutionally recognized rights.²⁴⁶ If the issue of cumulative effects is overlooked without concerted efforts to address the effects, the time might come when there will be no Aboriginal or treaty rights left to be exercised. Aboriginal traditional harvesting rights would obviously “be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.”²⁴⁷

4.2.2 Delegation to Third Party

Generally, it is believed that the delegation of some aspects of the duty to consult has become inevitable to enhance the quality of consultation and an efficiently conducted process. While delegation practices bring about some benefits, they also introduce tensions surrounding the Crown’s delegation of the duty to consult to tribunals which can implement only the consultation powers expressly conferred on them,²⁴⁸ and the proponents who may carry out the procedural aspect of consultation.²⁴⁹ While holding that the duty to consult rests on the Crown, the Court relating procedural aspects of consultation to environmental assessment processes indicated that the Crown “may delegate procedural aspects of consultation to industry proponents seeking a particular development.”²⁵⁰

The procedural components of the duty to consult, under the law, may be delegated to industry proponents seeking a particular development.²⁵¹ Some provincial Crown policies confer this responsibility on the government; others generally designate the “substantive execution” of the

²⁴⁵ Duinker & Greig, *supra* note 243 at 156. See also Andrea Bradley and Michael McClurg, “Consultation and Cumulative Effects: Is There a Role for the Duty to Consult in Addressing Concerns about Overdevelopment” (2012) 15:3 OBA Aboriginal Law Section 2. [Bradley & McClurg].

²⁴⁶ See for example *Lameman v. Alberta*, 2013 ABCA 148, 553 AR 44 at para 5. See also Robert Normey, “Removing All Reasonable Cause of Discontent: Noteworthy Decisions of the Alberta Court of Appeal in Aboriginal Litigation” (2014) 52 Alberta L Rev 99.

²⁴⁷ *Mikisew Cree*, *supra* note 2 at para 48.

²⁴⁸ Ritchie, *supra* note 36 at 408; *Rio Tinto*, *supra* note 103 at paras 55-63.

²⁴⁹ Ariss et al, *supra* note 36 at 17. See also Peter Landmann, “Crown Delegation of Consultation Responsibilities” (2012) 5:3 OBA Aboriginal Law Section 2. [Landmann].

²⁵⁰ *Haida Nation*, *supra* note 2 at para 53.

²⁵¹ *Ibid* at para 53

duty to consult informally to the proponents.²⁵² What is essential to the delegation process, however, is to distinguish the substantive component²⁵³ of consultation from the procedural component, hence, clarifying which aspect of the duty that is delegable.²⁵⁴ In an attempt to sensitise the Crown about the limit to how far implied delegation may be assumed, the Court expressed concern about giving out undefined discretion to proponents stating that “[i]t is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts... Such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers.”²⁵⁵

Delegation of consultation presents some “elements” of complexity in the duty to consult.²⁵⁶ Of particular concern to Aboriginal peoples is that delegation undermines the Nation-to-Nation relationship: “it creates a disconnect between Aboriginal peoples and the Crown.”²⁵⁷ The underlying objective of the duty to consult is to promote reconciliation between the Crown and the First Nations through a renewed relationship that is more demonstrative of the nation-to-nation relationship, “rooted in the *two-row wampum* tradition of autonomy, mutual respect, and friendship.”²⁵⁸

The province of Alberta, for instance, has a policy that appears to define the provincial Crown as merely playing the role of a “neutral arbiter” between proponents and First Nations, detaching itself from substantially participating in consultation and accommodation.²⁵⁹ Additionally, Ariss et al argue that excessive delegation sets the Crown up to act as a “neutral arbiter”... seeking balance instead of protecting Aboriginal rights,” an approach which seems to reduce the Crown’s responsibility and holds out Aboriginal peoples merely as “stakeholders” instead of nations.²⁶⁰

²⁵² Thomas Isaac & Anthony Knox, “The Crown’s Duty to Consult Aboriginal Peoples” (2003-04) 41 Alberta L Rev 49 at 73.

²⁵³ Landmann, *supra* note 249 at 2.

²⁵⁴ *Ibid.*

²⁵⁵ *Haida Nation*, *supra* note 2 at para 51.

²⁵⁶ Ritchie, *supra* note 36 at 415.

²⁵⁷ *Ibid.*

²⁵⁸ Jennifer E Dalton, “Aboriginal Self-determination in Canada: Protections Afforded by the Judiciary and Government” (2006) 21:1 CJLS 11.

²⁵⁹ Ritchie, *supra* note 36 at 415.

²⁶⁰ Ariss et al, *supra* note 36 at 17.

This mars the opportunities that present themselves for Crown and Aboriginal peoples to engage in meaningful consultation and to advance potential for reconciliation.²⁶¹

Delegation to entities that are neither the federal nor the provincial Crown with limited capacity to act under the enabling statute may limit the extent to which they can, for instance, exercise their ability to make accommodations. Being creatures of statute, entities such as adjudicatory tribunals, municipalities, and regulatory boards may determine that they are able to discharge consultation only to the extent that is delegated in the creating statute.²⁶² In *Huu-Ay-Aht*, the Court found that the Crown's effort to consult was not sufficient.²⁶³ The accommodation measure offered was not sufficient as those negotiating on behalf of the Crown determined that they were bound by the provincial policy, having no authority to offer accommodation beyond what was available under the enabling statute.²⁶⁴

The above argument may also apply to consultation delegation involving project proponents who may offer some form of accommodation including job offers and training opportunities for the First Nations, but as project proponents, they are "quite limited by their nature and capacity."²⁶⁵ Passelac-Ross and Potes argued that "over-reliance" on the proponent to provide accommodation will result in significantly limited accommodation measures that may not adequately address Aboriginal concerns, though it makes practical sense to involve proponents in some consultative duties.²⁶⁶ Most often the accommodation measures necessary to address the legitimate concerns of Aboriginal peoples might exceed capacities of the proponent.²⁶⁷

A delegation to the proponent also carries another drawback with it. Once the decision-making process is delegated to the proponent, "the discourse naturally shifts gears," and how to get the proposed project done becomes the central question for consideration.²⁶⁸ This has the tendency to make Aboriginal groups appear "obstructionist" in the event that they object to the approval of

²⁶¹ Ritchie, *supra* note 36 at 415.

²⁶² *Ibid* at 416.

²⁶³ *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697 at para 128.

²⁶⁴ *Ibid* at para 52; Ritchie, *supra* note 36 at 417.

²⁶⁵ Ritchie, *ibid.* at 417.

²⁶⁶ Monique Passelac-Ross & Veronica Potes, "Consultation with Aboriginal Peoples in the Athabasca Oil Sand Region: Is it Meeting the Crown's Legal Obligations?" (2007) 98 Canadian Inst Res L 6.

²⁶⁷ Monique Passelac-Ross & Veronica Potes, *ibid.*, at 6; Ritchie, *supra* note 36 at 6.

²⁶⁸ Bradley & McClurg, *supra* note 245 at 4.

the project “and having to resort to injunctions, and in some cases, blockades.”²⁶⁹ This is more so where proponents have invested so much effort and money with the high expectation that consultation produces a positive outcome. The proponent naturally focuses more on getting a project done within a timeline. This approach results in Aboriginal concerns not being sufficiently addressed such that meaningful consultation and accommodation cannot occur.

Furthermore, less emphasis should be placed on “proponent certainty and project completion” as this approach shifts focus from the principal aim of consultation, reducing the scope and potential result of consultation process, while the proponent’s target remains focused on the completion of its project.²⁷⁰ This affects the ability of Aboriginal communities who are inundated with many consultation requests and voluminous documents sent by proponents for review to present their processes and legal norms to the consultation process.²⁷¹

Delegation to industry will cause confusion if the Crown stands only as an umpire rather than being proactively involved. Besides, the Court also states that the Crown is saddled with the sole legal responsibility for consultation. It is the Crown only that can effectively address the different understandings of the meaning of Crown land and traditional territory. The Crown only can effectively determine what rights Aboriginal peoples have regarding these lands. Meaningful consultation, therefore, requires the Crown to be proactively involved in the entire consultation process.²⁷²

4.2.3 Balancing of Interests: Public Interest

On one hand, the government seems to place too much emphasis on the public interest in the balancing of interest principle. This appears to create a natural tendency that the government would tend not to stop a proposed activity even where there is Aboriginal opposition. In *Van der Peet*, McLachlin J. in her dissenting judgment explained the limitations that could be present in relying on the concept of reconciliation to balance the rights of Aboriginals and non-Aboriginals: it permits the Crown to transfer the Aboriginal rights under section 35 to non-Indigenous

²⁶⁹ *Ibid* at 5.

²⁷⁰ Ariss et al, *supra* note 36 at 18.

²⁷¹ *Ibid* at 18.

²⁷² *Ibid*; Bradley & McClurg, *supra* note 245 at 6.

peoples' culture, where Aboriginal rights must find their exercise. Secondly, it limits constitutionally protected Aboriginal peoples' rights and elevates non-Aboriginal peoples' interests not protected under the constitution.²⁷³ The concept of reconciliation which stems from the goal of protecting Aboriginal rights enshrined under section 35 of the constitution should be conceived as a tool to achieve "a just and lasting settlement of [A]boriginal claims."²⁷⁴

The public interest context in the balancing of interests for the purpose of reconciliation appears to serve more as a shield to continue with a project even where there is a major protest by Aboriginal communities. The court has held that project approval that breaches the constitutionally protected rights of Aboriginal peoples does not serve the public interest.²⁷⁵ The major drawback of the "balance-approach" is that it undermines the respect for Aboriginal constitutionally recognized rights from which the Crown's duty to consult was generated in the first place.²⁷⁶ As a starting point, political consultations required to foster reconciliation must basically take cognisance of the Aboriginal peoples' constitutional entitlements.²⁷⁷ Ariss et al argued that:

Aboriginal and treaty rights are a constitutive element of Canada, and economic or other interests do not amount to rights. To make Aboriginal and treaty rights commensurable with "interests" misunderstands their purpose and standing. Any balancing in accommodations must stem from section 35 and not reduce Aboriginal and treaty rights to interests.²⁷⁸

Policies that place much emphasis on "public interest" in the "balancing of interest" approach appear to reduce the significance of consultation and accommodation, which seek to safeguard Aboriginal and treaty rights.²⁷⁹ This approach puts forward a standpoint that is not as much concerned about safeguarding Aboriginal rights, as it places much interest on guaranteeing "greater certainty for government, industry and First Nations."²⁸⁰

²⁷³ *Van der Peet*, *supra* note 4 at paras 310-16.

²⁷⁴ *Ibid* at 310.

²⁷⁵ *Clyde River*, *supra* note 30 at para 40.

²⁷⁶ Ariss et al, *supra* note 36 at 50.

²⁷⁷ *Ibid*.

²⁷⁸ *Ibid*.

²⁷⁹ *Ibid*.

²⁸⁰ New Brunswick, Aboriginal Affairs Secretariat, *Government of New Brunswick Duty to Consult Policy* (November 2011). See also Ariss et al, *supra* note 36 at 49.

Rachel Ariss et al argue that the Nova Scotia²⁸¹ and British Columbia²⁸² policies described accommodation in a manner that could lead to an exchange of Aboriginal peoples' rights too easily with interests of the broader societies.²⁸³ They also argue that Ontario's policy description of accommodation as "a process of balancing of interests" portrays the provincial government as an impartial umpire among groups with interests rather than functioning as a Crown agent for discharging the legal duty.²⁸⁴ Interestingly, however, Saskatchewan's policy introduces the terminology of rights rather than balancing of interests, evidently recognizing and respecting the fact that Aboriginal peoples are "holders of Treaty and/or Aboriginal rights" and that it will not treat First Nations and Métis as mere "stakeholders".²⁸⁵ Saskatchewan's policy has as its foremost objective "[to] respect and protect Treaty and Aboriginal rights by ensuring, through the consultation process and subsequent decisions, that negative impacts on these rights and uses are avoided, minimized or mitigated and rights are accommodated, as appropriate."²⁸⁶

Balancing the interests of Canadian society with Aboriginal resistance to infringement of their Aboriginal rights creates unrest and dissatisfaction where Aboriginal communities feel their interests are minimally addressed. The Court held that the government must balance the interests of the potentially affected Aboriginal community with that of the non-Aboriginal society in implementing the duty to consult.²⁸⁷ Governments for their part seem to lean largely on 'balancing interests', consulting only to meet the minimal requirement, which may not necessarily protect Aboriginal rights. This seems to beg the question: what is the implication of section 35 if the rights it ought to protect eventually erode with no Aboriginal or treaty rights left to exercise in the bid of balancing public interests with Aboriginal rights?²⁸⁸

²⁸¹ Nova Scotia, *Government of Nova Scotia Policy and Guidelines: Consultation with the Mi'kmaq of Nova Scotia* (April 2015) at 24. Nova Scotia's policy provides that, "in discussing accommodation measures, the government may have to balance Mi'kmaq interests with broader societal interests."

²⁸² British Columbia, *Updated Procedures for Meeting Legal Obligations when Consulting with First Nations, Interim* (May 2010) at 6. British Columbia's policy states that, "the Crown *must* balance concerns regarding potential impact of the decision on the Aboriginal interest with other societal interests."

²⁸³ Ariss et al, *supra* note 36 at 49.

²⁸⁴ *Ibid*; Ontario, Ministry of Indigenous Relations and Reconciliation, *Draft Guidelines for Ministries on Consultation with Aboriginal Peoples Related to Aboriginal and Treaty Rights* (17 November 2015) [Ontario MIRR Draft Guidelines].

²⁸⁵ Government of Saskatchewan, *First Nation and Métis Consultation Policy Framework* (June 2010) at 3. [Saskatchewan Consultation Policy].

²⁸⁶ *Ibid* at 3.

²⁸⁷ *Haida Nation*, *supra* note 2 at para 50.

²⁸⁸ *Mikisew Cree*, *supra* note 2 at para 48.

Emphasis on the balancing of interests appears to overlook the main aim of protecting Aboriginal rights. Aboriginal peoples are not stakeholders but “holders of Treaty and/or Aboriginal rights.”²⁸⁹ The language prioritising balancing of interests suggests the reluctance of some provinces to work in actual partnership with Aboriginal communities. The perception of Aboriginal peoples as having the reciprocal duty to ensure advancement of proposed projects and a consequent duty to facilitate them “detracts from an understanding of consultation as a means of rights protection and advancement.”²⁹⁰

Another problem with the balancing approach is that it does not account for the possibility that there are interests that cannot be balanced. While balancing interests is necessary to ensure that Aboriginal peoples do not unnecessarily obstruct developments, it should be kept in mind that in some circumstances, a ‘balancing of interests’ will not be enough because “there are interests that cannot be balanced, risks that cannot be mitigated and lines that cannot be crossed—there are promises that cannot be broken.”²⁹¹ This circumstance includes where the Aboriginal peoples’ identity is at risk. Balancing of interests that give the Crown the prerogative to insist on proceeding with a project where it deems necessary, notwithstanding Aboriginal objections, could only be appropriate if the Crown recognizes that not all interests can be balanced.

Balancing the interests of Canadian society with projects that potentially threaten the ability of Aboriginal peoples to continue with the exercise of their constitutionally recognized rights is a breach of the Crown’s general fiduciary duty to Aboriginal people and the fundamental obligation under section 35 to protect Aboriginal and Treaty rights.²⁹² Notably, the Ontario MIRR Draft Guidelines states that obtaining Aboriginal consent may be necessary in rare circumstances such as where there are serious impacts. Unfortunately, this provision accommodates only Aboriginal title.²⁹³

²⁸⁹ *Saskatchewan Consultation Policy*, *supra* note 285 at 3.

²⁹⁰ Ariss et al, *supra* note 36 at 50; Ravina Bains & Kayla Ishkanian “The Duty to Consult with Aboriginal Peoples A Patchwork of Canadian Policies” (Vancouver: Fraser Institute, 2016) at 8–9; Ontario, Ministry of Mines and Northern Development, “MNDM Policy: Consultation and Arrangements with Aboriginal Communities at Early Exploration”, (September 2012) at 4 [*Ontario MNDM Policy*].

²⁹¹ See Bruce McIvor, *First Peoples Law: Essays on Canadian Law and Decolonization* 3rd edn. (Vancouver: First Peoples Law Corporation, 2018) at 66.

²⁹² *Ibid* at 66.

²⁹³ See generally *Ontario MIRR Draft Guidelines*, *supra* note 284

As noted earlier, the Saskatchewan Policy requires dialogue with First Nation communities on proposed accommodation measures, which may entail considering many options, including stopping a proponent's proposed project.²⁹⁴ Provinces like BC and Ontario make similar provisions—their policies do not specifically make provisions that include rejecting the application to conduct an activity. Be that as it may, this proclivity tilts towards building relationships with First Nations.²⁹⁵

On the other hand, some Aboriginal groups in Canada (also at the international level) believe that the duty to consult provides a veto over development plans, and to some, at least, there is a high expectation that the principle will metamorphose into an absolute right to give or withhold their consent. While the character of the consultation process is determined by the nature of Aboriginal rights and the interest at stake and the potential impacts of the proposed development, the duty does not contemplate a veto power and should not be construed as such.

The Court in several decisions has repeatedly clarified that the duty does not confer a veto power.²⁹⁶ Though the duty to consult aims to curb the Crown's unilateral infringement of Aboriginal rights, it does not provide Aboriginal peoples with the absolute right to reject proposed development.²⁹⁷ An absolute veto right with no balancing mechanism in respect of matters that are of legitimate interest to the society is inconsistent with the standard of participatory consultation that was expounded by the Supreme Court and incorporated in international norms.

The duty to consult is said to strike a balance between Aboriginal peoples and the rest of Canadian society, while intending to offer an appropriate degree of protection to Aboriginal rights and enabling the government to go ahead with making decisions in the “context of uncertainties on the final shape of Aboriginal rights.”²⁹⁸ Hence there is a “reciprocal” duty on

²⁹⁴ *Saskatchewan Consultation Policy*, *supra* note 285 at 13.

²⁹⁵ Ariss et al, *supra* note 36 at 49; Ontario MNDM Policy, *supra* note 290 at 9.

²⁹⁶ *Haida Nation*, *supra* note 2 at para. 48; *Mikisew Cree*, *supra* note 2 at para. 66; *Little Salmon*, *supra* note 110 at para. 14.

²⁹⁷ Boreal Leadership Council, *supra* note 147 at 4.

²⁹⁸ Newman-RRL, *supra* note 110 at 8.

Aboriginal groups not to frustrate, but to engage in decision-making processes in good faith while expressing their concerns.²⁹⁹

Furthermore, within the jurisdiction of the Crown's sovereign rights and duties towards society as a whole, the Crown reserves the final prerogative to decide whether a project may continue after consultation with Aboriginal peoples and there is no obligation to reach an agreement with Aboriginal groups such that there is no veto power. The Crown is however required to consult diligently to ensure that Aboriginal rights and interests are protected respecting the impact of its decisions.

So if there is no obligation to reach an agreement and no power to veto, this creates an incentive for the Crown or proponents to actually conduct decision-making process that may be fulfilled merely at a minimal level, knowing that the doctrine of the duty to consult provides the Crown with the ultimate right to decide if a proposed project could proceed. This reflects an apparent power imbalance present in the legal doctrine. It goes further to show that Aboriginal peoples' ability to protect their constitutional rights may often be restricted by the term "compromise" even before consultation processes take place.³⁰⁰ The implications of this approach towards duty to consult are unlikely to contribute to the goal of inter-societal reconciliation.

4.3 Conclusion

The Supreme Court has advanced the duty to consult and accommodate in order to promote a long-lasting mutual relation between Aboriginal and non-Aboriginal societies in Canada. While the duty is intended to protect Aboriginal and treaty rights and ultimately achieve reconciliation between Aboriginal and non-Aboriginal societies, the current structure of the duty to consult seems to make it difficult to effectively implement the duty to consult for the protection of Aboriginal rights and to further the goal of reconciliation. The Canadian courts have emphatically stated that the process of accommodation requires balancing of interests, creating a

²⁹⁹ See generally, Gray-INAC Report, 2016, *supra* note 6; *Haida Nation*, *supra* note 2 at para 42; *Halfway River First Nation v. British Columbia*, [1999] BCJ No 1880 (CA) at para. 24; *Long Plain First Nation v. Canada*, [2015] FCJ No 96 (FCA) at para 158.

³⁰⁰ Ritchie, *supra* note 36 at 432.

view of the duty to consult that requires Aboriginal peoples to do all the balancing. This also creates leeway for a minimal approach to implementation of the duty to consult.

In essence, the Crown's approach to consultation should support a progressive relationship between the Crown and Aboriginal peoples. The Supreme Court of Canada held that the guiding principle in all circumstances is for the Crown to uphold the honour of the Crown and to implement reconciliation in a manner that considers Aboriginal interests at stake.³⁰¹ A Crown action that does not consider the constitutional commitments under section 35 is the "antithesis of reconciliation and mutual respect."³⁰² An impoverished approach to the fulfilment of the duty to consult and accommodate will no doubt leave the principal goal of section 35 unattained. This approach should be avoided in order to create a feeling of trust and to enhance better relationships of mutual respect and equal opportunity. The next chapter suggests that embracing a consent standard would support meaningful negotiation and dialogue to resolve possible disagreements in future projects, thus better complying with the underlying legal principle of the duty to consult.

³⁰¹ *Haida Nation*, *supra* note 2 at para 45.

³⁰² *Mikisew Cree*, *supra* note 2 at para 49.

Chapter 5: The Pathway to Effective Consultation and Reconciliation

5.0 Introduction

The current structure of the duty to consult and accommodate does not meet the goal of reconciliation, the fundamental objective of section 35. This chapter discusses at some length why the international norm of FPIC might have bearing on Canadian duty to consult case law. It discusses how there can be a concept of consultation aiming at consent that differs from the current duty to consult and that also differs from an obligation to obtain consent/veto power. This chapter explores ways in which the law could accommodate a concept of consultation aiming at consent and how such a standard has been applied in particular scenarios. Moving toward such an approach would comply better with the principle of reconciliation.

The Supreme Court of Canada developed the duty to consult and accommodate as a fundamental constitutional instrument to support the Crown-Aboriginal relationship concerning Aboriginal and treaty rights. The constitutional duty burdens the Crown with the obligation to consult and where appropriate accommodate Aboriginal peoples' rights when the Crown contemplates any development that may have potential impacts on Aboriginal or treaty rights.

The honour of the Crown is best reflected by a requirement of consultation with a view to true reconciliation.³⁰³ In this, the Court seems to take the position that it is not to interfere in the ongoing reconciliation process – parties are expected to work out what is best for them. The duty recognizes that parties must work together to reconcile their interests.³⁰⁴ The court encourages reconciliation driven by negotiation between the parties as it appears to be the best way to reach reconciliation between Aboriginal peoples and the Crown.³⁰⁵ The Court can, however, order the

³⁰³ *Rio Tinto*, *supra* note 103 at para 34.

³⁰⁴ *Clyde River*, *supra* note 30 at para 24. See also Jim Reynolds, *Aboriginal Peoples and the Law: A Critical Introduction* (Purich Press, 2018) at 20; *First Nation of Nacho Nyak Dun v. Yukon*, [2017] 2 SCR 576; Constance MacIntosh, "Tsilhqot'in Nation v BC: Reconfiguring Aboriginal Title in the Name of Reconciliation" (2014) 47 UBC L Rev 167 at 176; Maria Morellato, *The Crown's Constitutional Duty to Consult and Accommodate Aboriginal and Treaty Rights* (Ottawa: National Centre for First Nations Governance, 2008), part II.

³⁰⁵ *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 SCR 371 at para 47.

government to embrace the attitude of honour that is essential for the reconciliation of peoples to flourish.³⁰⁶

The courts' distribution of negotiating power in framing the duty to consult does not pay enough attention to Aboriginal values to motivate meaningful negotiation in the duty to consult. This appears to be done in an attempt to maintain the Crown's assertion of sovereignty around the constitutional order in framing the duty to consult.³⁰⁷ As it is, the Crown is responsible for determining the strength of the Aboriginal claim. The Crown also assesses Aboriginal concerns and situates Aboriginal consultation within the spectrum analysis, a process that takes time, sometimes even longer than anticipated. A consultation process may also require that the Crown incur costs in providing resources for meaningful Aboriginal participation. Because of these aspects, there could be tendencies on the part of the Crown's representatives to assess Aboriginal concerns as minimal, an approach that will be unlikely to support social or political harmony between the Crown and Aboriginal peoples.³⁰⁸

Thus, consultation for future development should be treated as a site for ongoing reconciliation between the Crown and Aboriginal communities rather than a procedural box to be ticked. A minimalistic approach to reaching the requirements of the constitutional duty by government officials will not promote reconciliation. For instance, where government officials treat consultation processes as a mere courtesy or neglect to give notice of the decision to take up a portion of Aboriginal land until a long period has elapsed, it creates an unfortunate effect of undermining an opportunity for effective communication between parties in support of reconciliation.³⁰⁹

Reconciliation necessarily includes positive actions of mutual respect that function "to heal rifts and create foundations for a harmonious relationship."³¹⁰ The Crown's decisions affecting Aboriginal and treaty rights can uphold Aboriginal rights and foster reconciliation goals, establishing mutual understanding and trust between Aboriginal peoples and the Crown. A diligent approach to engaging Aboriginal peoples in the decision-making process in future

³⁰⁶ Walters-The Jurisprudence of Reconciliation, *supra* note 38 at 186-87.

³⁰⁷ Cf. Hamilton & Nichols, *supra* note 137.

³⁰⁸ Walters-The Jurisprudence of Reconciliation, *supra* note 38 at 185.

³⁰⁹ See for example *Little Salmon/Carmacks First Nation v. The Government of Yukon (Minister of Energy, Mines and Resources)*, 2007 YKSC 28.

³¹⁰ Walters -The Jurisprudence of Reconciliation, *supra* note 38 at 168.

development, therefore, is necessary. A decision-making process devoid of meaningful consultation will most likely limit the ongoing reconciliation process mandated by the Crown's solemn promise recognizing and affirming Aboriginal and treaty rights. The ultimate goal of section 35 may remain unfulfilled without directions on how the government can engage Aboriginal groups in meaningful consultation processes.

5.1 Transformative Reconciliation

Canada's duty to consult doctrine has a purpose of furthering reconciliation. As argued by Walters, reconciliation perceived as relationship ("a richer sense of reconciliation"), is related to the ideal of legality, the way by which laws are recognized as just.³¹¹ The concept of reconciliation has been described by some writers as robust and progressive. However, the concept's interpretation in the implementation of policy is challenged by the understanding and the discharge of principle as a mere routine.³¹²

The TRC links a rich sense of reconciliation to self-determination for Aboriginal peoples in Canada, a position that resonates with an aspect of Cathal Doyle's perception of the FPIC requirement.³¹³ In one of the calls by the TRC, it encourages Canada to incorporate Aboriginal right to self-determination into its constitutional and statutory framework and also into its civic institutions, in line with the principles and standards of *UNDRIP*.³¹⁴ The Commission states that revitalizing Aboriginal self-determination consistently with the principle of *UNDRIP* is the appropriate standard for true reconciliation in present-day Canada.³¹⁵ The reconciliation proposed by the TRC is based on rebuilding Crown-Aboriginal relationships envisioned "in the Royal Proclamation of 1763 and in post-Confederation Treaties"³¹⁶ Making consent the objective of consultation could enable Canada to develop an all-inclusive idea of reconciliation that recognizes the relationship between Aboriginal and non-Aboriginal Canadians.³¹⁷

³¹¹ *Ibid* at 189; Ariss et al, *supra* note 36 at 40.

³¹² *Ibid.*

³¹³ See generally *TRC Summary Report*, *supra* note 181; Doyle, *supra* note 42 at 4.

³¹⁴ *TRC Summary Report*, *ibid* at 246.

³¹⁵ *TRC Summary Report*, *ibid* at 246.

³¹⁶ Ariss et al, *supra* note 36 at 16.

³¹⁷ *TRC Summary Report*, *supra* note 181 at 246.

5.1.1 Advancing Reconciliation through Meaningful Consultation

The *UNDRIP*, which embodies the principle of FPIC, does not use the word reconciliation, but it expresses the need to promote good relationships between states and Indigenous peoples. The TRC recommended that Canada adopt FPIC as a framework for reconciliation. The concept of obtaining Indigenous peoples' FPIC before development on their traditional lands sets an important aspiration for Canada's duty to consult and accommodate. However, there have been some misconceptions about FPIC in the *UNDRIP*, including the scope of FPIC and when Indigenous consent is required.³¹⁸ Barelli describes FPIC as a fundamental aspect of Indigenous self-determination. FPIC is minimally understood as requiring states to consult with Indigenous peoples in good faith to reach an agreement. FPIC is also understood as requiring that a development that is capable of affecting Indigenous rights should not be executed without the affected Indigenous peoples' consent.³¹⁹

Doyle conceived the FPIC requirement within a viewpoint of Indigenous self-determination.³²⁰ Doyle states that FPIC serves to support non-discriminatory public interests in the area of development—it is not inconsistent with development.³²¹ James Anaya supports a perception of FPIC that does not uphold a general veto-right against state conducts.³²² Anaya, however, maintains that the aim of a consultation process should be to obtain Indigenous consent while ensuring that one party does not impose its will on the other party.³²³ While supporting this view, Bas Rombouts posits that FPIC primarily aims to “fully integrate [I]ndigenous peoples into decision-making processes that affect them. It is, therefore, better to focus on how these processes should be shaped than to restrict the debate to whether FPIC includes a right to block decisions.”³²⁴ Martin Papillon & Thierry Rodon stressed that “...both historic land cession

³¹⁸ Rombouts, *supra* note 231 at 11; Ariss et al, *supra* note 36 at 21.

³¹⁹ Mauro Barelli, “Free Prior and Informed Consent in the *UNDRIP*: Articles 10, 19, 29(2) and 32(2)” in Jessie Hohman & Marc Weller, eds., *The UN Declarations on the Rights of Indigenous Peoples: A Commentary* (Oxford: Oxford University Press, 2018) 248. [Barelli- Oxford Commentary].

³²⁰ Doyle, *supra* note 42 at 4.

³²¹ *Ibid* at 6; Paul Joffe, “Canada’s Opposition to the UN Declaration: Legitimate Concerns or Ideological Bias?” in Jackie Hartley, Paul Joffe, and Jennifer Preston, eds., *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* at 5, cited in Sasha Boutilier, “Free Prior and Informed Consent and Reconciliation in Canada” (2017) 7 Windsor J Leg Stud 21 [Boutilier].

³²² Anaya Report, 2009, *supra* note 40 at para 46.

³²³ Doyle, *supra* note 42 at 149.

³²⁴ Rombouts, *supra* note 231 at 87.

treaties and modern land claims settlements are based on a similar principle, which is rooted in the Royal Proclamation of 1763 and the subsequent Treaty of Niagara.”³²⁵

To Philippe Hanna and Frank Vanclay, FPIC is to be viewed as a philosophy, a ‘right to be consulted’ and not a legal procedure.³²⁶ Therefore, where government activities affect Indigenous communities, the potentially affected Indigenous groups have the right to be consulted and their views addressed and respected, irrespective of the reach of the domestic legislation requirements.³²⁷ This point appears similar to Canada’s view of *UNDRIP* and the FPIC standard as an aspirational concept.

Justifying its opposition, Canada expressed concern that if FPIC is interpreted as conferring an absolute or unilateral veto power, then Aboriginal peoples may usurp the privilege. This assertion has been refuted as not having any basis because neither in *UNDRIP* nor in the broader body of international law is there a right to veto.³²⁸ Much as the duty to consult and accommodate or consent as articulated by the Court in *Tsilhqot’in* does not imply a veto or absolute right, FPIC in *UNDRIP* is applied in proportion to the potential harm to the rights of Indigenous peoples and to the strength of these rights and therefore not a veto.³²⁹ Nowhere in the *UNDRIP* is the word veto used. FPIC consequently does not give rise to any incompatibility with Canadian constitutional law. Moreover, the Supreme Court has also in many cases emphatically held that the duty to consult does not confer a veto-right.³³⁰

What is FPIC, then? The word ‘free’ indicates that consultation process should be implemented without any form of pressure and harassment. The term ‘prior’ suggests that consultation should be conducted before carrying out a project that is capable of affecting Indigenous peoples. The term ‘informed’ implies that Indigenous peoples should be given sufficient information regarding a proposed development, including the nature and likely impacts, size, location, scope,

³²⁵ See generally, Papillon & Rodon-EAP, *supra* note 160.

³²⁶ Philippe Hanna and Frank Vanclay, “Human rights, Indigenous Peoples and the Concept of Free, Prior and Informed Consent” (2013) 31 Impact Assessment & Project Appraisal 146 at 153 [Hanna & Vanclay].

³²⁷ *Ibid.*

³²⁸ *TRC Summary Report*, *supra* note 181 at 245; Manuela Tomei & Lee Swepston, *Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169* (Geneva: ILO, 1996) in Doyle, *supra* note 42 at 91 (the perception that ILO Convention 169 confirmed a veto right and created a “State within a State” has also been argued against by the ILO Office and Supervisory Mechanisms, stating that such “interpretation exaggerates the convention requirement for full participation and that a right to a veto is not provided”).

³²⁹ See generally, *TRC Summary Report*, note 181.

³³⁰ See generally, *Chippewas of the Thames*, *supra* note 30.

and duration of the development. FPIC, therefore, is minimally interpreted as requiring consultation with Indigenous peoples in good faith with the intention of reaching an agreement before proceeding with a project, particularly when a proposed development is capable of affecting Indigenous peoples' rights. While FPIC does not give rise to a general right to veto, states should not be too rigid to read this in a very restrictive way.

5.1.2 Rights are Generally not Absolute

Consent is not a general right to veto.. An understanding of a right to a veto to mean that any kind of project can be rejected, “in relation to matters that can be in the legitimate interests, not only of the [i]ndigenous party, but also of national society in general, is not consistent with the standard of participatory consultation which is incorporated into international norms.”³³¹ Furthermore, writers like Anaya have said that consent is an important precondition for implementing a proposed action where the action could have a significant impact. In this case, it is not enough to obtain Indigenous consent through agreements— Indigenous peoples could withhold their consent.

In examining the misinterpretation around the import of consent, it also important to note that the provision of Article 46(2) of the *UNDRIP* appears as a restriction on how to implement those rights articulated in *UNDRIP*. Article 46 (2) provides that:

The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

It is safe to state that the parameters for recognizing when consent is required are still at the formation stage, as varying opinions exist in relation to when FPIC should be mandatory. These inconsistencies within the consent regime are reflections of the difficulties in the development of the spectrum of participatory rights.

³³¹ Shin Imai, "Consult, Consent and Veto: International Norms and Canadian Treaties" (2016) Osgoode Legal Studies Research Paper Series Number 144 at 13 [*Imai-CCV*].

In *Saramaka v Suriname*³³² the court held that effective participation by the Indigenous people involved is necessary “when dealing with major development or investment plans that may have a profound impact” on Indigenous property rights and that the Indigenous people’s FPIC will be required in accordance with their traditions and customs.³³³ The court also considered “large-scale development or investment projects” as those activities that would have major impacts on Indigenous property which requires the state not only to comply with the duty to consult but also to obtain Indigenous consent in accordance with the Indigenous peoples’ customs and traditions.³³⁴ The Inter-American court in its Interpretive Judgment held that consent is required when the effect of a state’s action could affect the integrity of the Indigenous peoples’ traditional lands or natural resources.

Article 10 and 29(2) of the *UNDRIP* for example provides for circumstances when Indigenous consent is required. Under these articles, consent is needed for relocation of Indigenous peoples from their territory or before storage or disposal of hazardous materials. There are also a number of other constructions that have evolved as to when Indigenous consent may be required. In line with the *UNDRIP*, the Expert Mechanism on the Rights of Indigenous Peoples as well as the International Financial Corporation’s Performance Standard 7, for instance, have formulated circumstances when Indigenous consent may be required.³³⁵

5.2 Consent Standard

While Indigenous legal systems have long had counterparts in various ways, the concept of “informed consent”, using this specific term, was initially used generally in the field of clinical

³³² *Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (Ser. C) No. 172, Judgment of November 28, 2007.

³³³ *Ibid* at para 137.

³³⁴ *Ibid* at paras 134, 135. See also the former *Special Rapporteur on the situation of human rights and freedoms of indigenous peoples*, UN Doc. E/CN.4/2003/90, (2003) at para 66. According to the Special Rapporteur, “[F]ree prior and informed consent is essential for the (protection of) human right of the indigenous peoples in relation to major development projects”.

³³⁵ See Human Rights Council, Expert Mechanism, *Follow-up Report on Indigenous Peoples and the Right to Participate in Decision-making, with a Focus, on Extractive Industries* A/HRC/21/55 (16 August 2012), para 22, online:<https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-55_en.pdf>; Imai-CCV, *supra* note 331 at 15.

research.³³⁶ This practice, using the Western legal terminology of “informed consent”, was originally applied in modern medical practice in terms of doctor-patient relationships. The Nuremberg Code of 1947 was among the earliest written legal codifications of FPIC relating to conditions under which research and experimentation could be carried out on human beings.³³⁷ According to Schroder, “obtaining informed consent has become an essential part of modern medical practice.”³³⁸ To date, the concept of informed consent is still actively applied in the area of medical ethics. The projection of the conception outside the medical field culminated in the use of the idea in the context of trans-boundary movement of hazardous materials. In the 1980s and the 1990s, it was applied in the context of project development on Indigenous peoples’ land.³³⁹ Informed consent has increasingly been argued to be an important instrument for securing Indigenous approval before carrying out development on their traditional land. Meaningful consultation plays an important role in achieving Indigenous consent. One question which may arise at this point is: what is considered “meaningful consultation?”

Meaningful consultation involves sharing of power with affected Aboriginal peoples—it provides all parties a proportionate power required to negotiate on a level playing field. Meaningful consultation includes the right of the affected Aboriginal communities to be able to say no to planned development, as “consultation and participation will ring hollow if the potentially affected communities can say anything except ‘no’”³⁴⁰ The Legal Department of the World Bank Group (“WBG”) has specified that meaningful consultation should be construed as the ability to say no.³⁴¹

³³⁶ Joshua Rosenthal, “Politics, Culture, and Governance in the Development of Prior Informed Consent in Indigenous Communities” (2006) 47 *Current Anthropology* 119 at 120. Rosenthal stressed further that the (concept has been adopted and adapted) in the recent era as a guiding component of environmental safeguards.

³³⁷ Goodland, *supra* note 144. Because of these Western legal origins of the terminology, even though FPIC is a major goal of Indigenous rights advocates, some Indigenous scholars do not like the terminology and/or think it is important to highlight its sometimes dirty history. Volume 27:2 of the *International Journal on Minority and Group Rights* contains papers resulting from a conference on FPIC where such matters were discussed.

³³⁸ Doris Schoder, “Justice and Benefit Sharing” in Rachel Wynberg, Doris Schroeder & Roger Chennells, eds., *Indigenous Peoples, Consent and Benefit Sharing: Lessons from the San-Hoodia Case* (London: Springer, 2009) at 11-26.

³³⁹ Doyle, *supra* note 42 at 15.

³⁴⁰ Goodland, *supra* note 144 at 66.

³⁴¹ *Ibid.*

The term “meaningful consultation” has also been used in bank-financed projects. The World Bank explained that it is important to consider the views of affected groups.³⁴² Considering the views of affected groups will be achieved through a meaningful consultation, which requires borrowers to furnish potentially affected local groups with vital information on the intended project. Information should be delivered on time and made accessible to the affected groups consulted.

It is notable that the preceding discussion of the origins of consent is a Western account. Aboriginal people’s perception of consent is different from common law perspectives. Presently, there is no agreement on what acquiring consent requires.³⁴³ Generally, Aboriginal peoples understand FPIC as a bedrock for Aboriginal self-determination governance process. Although to some Aboriginal peoples, FPIC is perceived as a right to veto a project unless Aboriginal consent is obtained. However, some Aboriginal peoples perceive consent as a protective instrument for the rights held by Aboriginal peoples, which are inherent in the right to self-determination.³⁴⁴ With this perception, many Aboriginal peoples seek genuine participation, full transparency, and regards for Aboriginal Peoples’ consultation processes- they require that projects to be carried out, having regards to their views as to how they want their land to be used.

5.2.1 Implementing a Consent Standard

There is a need to clarify that this section does align with Barelli’s flexible approach to consent. While many controversies abound as to the correct interpretation of “consent” in FPIC, Barelli clarifies that the expression “in order to obtain” Indigenous consent should not be construed as mandating upon states an absolute obligation to obtain Indigenous consent. In other words, FPIC does not imply an absolute right to veto. However, for adequate protection of Indigenous peoples’ rights, Articles 19 and 32 should not be construed in an “overly restrictive” manner.³⁴⁵

³⁴² World Bank, “Meaningful Consultation in Environmental Assessments” (1998) 39 Social Development Notes: Environmental and Socially Sustainable Development Network 1.

³⁴³ Nathan Yaffe, “Indigenous Consent: A Self-Determination Perspective” (2019) 19 Melbourne J Int’l L 703 at 705.

³⁴⁴ Grand Chief Edward John, Akile Ch’oh, “Series – First Nations’ Rights: The Gap between Law and Practice, Consent or Consultation: Examining the Gap” (Vancouver: January 30, 2014) at 10, online: <http://www.lrwc.org/ws/wpcontent/uploads/2014/05/Chief-John-Powerpoint.pdf>.

³⁴⁵ Barelli-Oxford Commentary, *supra* note 319 at 253.

FPIC should, therefore, be articulated within the spirit of the *UNDRIP* for adequate protection of Aboriginal peoples' rights over their traditional territories. In this way, the duty to consult should be interpreted within the spirit of section 35, because if Canada implements decisions in the face of Aboriginal opposition to developments that are capable of producing adverse consequences on Aboriginal rights, the very purpose of these rights entrenched in the constitution would be severely defeated.³⁴⁶

The duty to consult as presently framed appears to imply that once the procedural requirements are reached, no “substantive” rights need additional protection.³⁴⁷ This is not a good “recipe” for meaningful consultation, and will most often result in prolonged conflict rather than reconciliation. The Court specified in *Mikisew Cree*, 2018, that “the principle of reconciliation and not rigid formalism should drive the development of Aboriginal law.”³⁴⁸ The Crown’s approach to consultation has a significant role to play in developing a mutual Crown-Aboriginal relation, irrespective of the outcome of the consultation process. Moreover, the need for reconciliation makes it necessary for the Crown to conduct itself with honour in dealing with Aboriginal peoples, engaging Aboriginal peoples with an outlook to reach an agreement.

Therefore, a collaborative approach between the Crown and Aboriginal peoples, which focuses on obtaining consent as an objective of consultation, rather than a “*no veto-right*” and the “*status of rights held at law*” approach will be far-reaching and its prospective impacts transformative. This approach, of course, could begin with many other major future projects, such as SMRs. Implementation of a consent standard will have significant impacts on future resource development in Canada. A duty to consult that is modelled after FPIC could ensure a meaningful consultation process that helps to resolve areas of disagreements, provide proponents with a good foundation for creating collaborative relationships with Aboriginal peoples.

Moreover, the concept of consent is not entirely missing in Canadian law, although it has been argued to be almost non-existent.³⁴⁹ In *Tsilhqot'in*, the Court sets a consent standard that is limited to cases involving established Aboriginal title.³⁵⁰ The court held that consent lies at the

³⁴⁶ *Ibid* at 248 – 249.

³⁴⁷ Hamilton & Nichols, *supra* note 137 at 736.

³⁴⁸ *Mikisew Cree*, 2018, *supra* note 3 at para 44.

³⁴⁹ Hamilton & Nichols, *supra* note 137 at 373.

³⁵⁰ *Tsilhqot'in Nation*, *supra* note 141 at para 168.

very high end of the spectrum and that its infringement is conditioned upon justification of a compelling and significant public purpose. However, just as in cases of asserted Aboriginal rights or claims, the Crown reserves the unilateral power to infringe on Aboriginal established title.³⁵¹ Even though consent is required here, the Crown may approach consultation process merely to justify a proposed unilateral infringement and nothing more. Hamilton and Nichols argue that even if the Crown's unilateral infringement power is excluded, the difficulties and costs relating to establishment of Aboriginal title or negotiated settlements in terms of modern treaties imply that a consent standard is almost not in existence in Canada. The Crown's unilateral power of infringement reduces meaningful dialogue regarding the level of Aboriginal rights and the Crown's obligations, leading to disagreements and numerous litigations.³⁵² In *Secession Reference*, the Supreme Court of Canada specified that negotiations in a "thick" constitutional framework "actually undermine the obligation to negotiate and render it hollow"³⁵³ The court explained further that:

Refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole. Those who quite legitimately insist upon the importance of upholding the rule of law cannot at the same time be oblivious to the need to act in conformity with constitutional principles and values, and so do their part to contribute to the maintenance and promotion of an environment in which the rule of law may flourish.³⁵⁴

Meaningful negotiation can be achieved if Canada removes its focus on "unilateralism."³⁵⁵ In *Ktunaxa Nation*, the court held that where the Crown meets its procedural obligations, development may go on without Aboriginal consent. Allowing the Crown to implement projects which may have adverse consequences on Aboriginal peoples' traditional lands, as well as Aboriginal peoples' cultures and lives will frustrate the spirit of section 35, the main purpose of enacting a special legal framework for Aboriginal peoples' rights.³⁵⁶

Furthermore, the consent standard should be extended in the context of treaty rights, especially if the Crown decision has a potential adverse impact, resulting in a complete erosion of the exercise

³⁵¹ *Ibid.*

³⁵² Hamilton & Nichols, *supra* note 137 at 737.

³⁵³ *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 91; Hamilton & Nichols, *ibid* at 737.

³⁵⁴ *Reference re Secession of Quebec*, *ibid* at para 95.

³⁵⁵ Hamilton & Nichols, *supra* note 137 at 757.

³⁵⁶ Barelli-Oxford Commentary, *supra* note 319 at 254.

of treaty rights. Also, the government's interpretation of the historic treaties in a manner that limits its obligations to improve Crown-Aboriginal relationships and meet its commitments in the treaties would result in a relationship marked by distrust.³⁵⁷ Obtaining consent regarding treaty rights should focus more on the possible adverse impact of future activities on Aboriginal treaty rights, irrespective of particular disputed interpretations of treaties.³⁵⁸ A commitment to implement the duty to consult using FPIC as a standard could ensure that the Crown collaborates with Aboriginal peoples to address Aboriginal concerns seeking to obtain consent rather than leveraging disputed treaty terms to avoid meaningful consultation.³⁵⁹

Canada is enthusiastic about exploring several options for reliable sources of energy and unlocking the many benefits that its natural resources can offer, but that does not mean Canada may circumvent its constitutional duties to protect Aboriginal and treaty rights. Although it is agreed that Aboriginal peoples do not have a veto right, the Crown should avoid engaging Aboriginal communities in solely minimalist ways. While it is natural that the Canadian government will often align its interest with development, this must not be permitted to threaten the continued exercise of Aboriginal and treaty rights or result in an erosion of these rights on account of the public interest. If the cumulative effect of consultation for development eventually leads to the complete erosion of Aboriginal and treaty right, leaving the Aboriginal communities with no right to exercise, then Canada may not be anywhere close to reconciliation. Section 35 will become meaningless and protect no more rights. If consultation is implemented with a minimalistic approach in the placement of SMRs, it will be challenging to believe in its prospects to improve Crown-Aboriginal reconciliation.³⁶⁰

The procedural aspect of the duty to consult developed without consent as an aim appears to make no sense of the phrase "finding a middle ground." The current practice of Canadian consultation suggests that Aboriginal peoples could always be at the receiving end of decisions, even before the Crown approaches them for negotiation. Gordon Christie's illustration noted that

³⁵⁷ Manley-Casimir, *supra* note 216 at 331.

³⁵⁸ Boutilier, *supra* note 321 at 9..

³⁵⁹ Boutilier, *ibid* at 9.

³⁶⁰ Ritchie, *supra* note 36 at 429.

it is almost certain that a decision to construct a road made through a consultation process will proceed.³⁶¹

The result of this approach is that even before decisions are made, the Crown may have concluded that a proposed project must be approved. In any case, the decision to implement a decision in the face of Aboriginal opposition could be covered by the public interest justification with the power of unilateral infringement. This begs the question: are Aboriginal communities different from the rest of the public in favour of whom “public interest” is applied? A public interest philosophy that protects the right of development of a section of the public, but tends to gradually erode the constitutionally protected rights of the other section of the public (Aboriginal peoples) will most likely not achieve the goal of reconciliation. In line with this argument, Doyle states that:

Consultation, negotiations, participation and partnership without a requirement of consent freeze existing power relations and leaves Indigenous peoples with little leverage to influence the outcome of the decision-making process [...] States, national organizations, global financial institutions, and transactional extractive corporations currently hold the decision-making power and many of them are clearly reluctant to share it with Indigenous peoples.³⁶²

The interactions between Aboriginal peoples and resource development on many occasions have met lots of confrontations and in some cases, led to protracted projects. For example, the proposed Trans Mountain Pipeline Expansion Project (a \$6.8 billion construction project) has been delayed partly because of an alleged failure to consult some affected Aboriginal communities.³⁶³ The proponent had already invested hundreds of millions of dollars before the project was stalled. Similarly, the Northern Gateway Pipeline was confronted with much Aboriginal opposition as a result of inadequate consultation, and consequently a decision against the approval of the project.³⁶⁴ It is important to note that about \$600 million had been invested in the project before its cancellation. Additionally, the Energy East project and Petronas

³⁶¹ Christie-Developing Case Law, *supra* note 33 at 160.

³⁶² Doyle, *supra* note 42 at 283-84.

³⁶³ See Alex Boutilier and Bruce Campion-Smith, “Liberals approve Trans Mountain pipeline, reject Northern Gateway Plan” in *The Star*. (November 29, 2016), online: <<https://www.thestar.com/news/canada/2016/11/29/liberals-approve-trans-mountain-line-3-pipeline-projects.html>> (Accessed November 18, 2018).

³⁶⁴ Jason Proctor, “Northern Gateway pipeline approval overturned”, *CBC News* (30 June 2016), online: <<https://www.cbc.ca/news/canada/british-columbia/northern-gateway-pipeline-federal-court-of-appeal-1.3659561>> (Accessed November 20, 2018).

Northwest's multi-billion-dollar liquefied natural gas plant project suffered similar fates as the projects mentioned above, out of a mix of factors including Indigenous issues.³⁶⁵

In the Trans Mountain case (*Tsleil-Waututh Nation v. Canada (Attorney General)*), the Federal Court of Appeal held that the Crown failed to discharge the duty to consult adequately.³⁶⁶ While expressing the importance of meaningful dialogue in consultation process, the court states that:

Canada was required to do more than receive and understand the concerns of the Indigenous applicants. Canada was required to engage in a considered, meaningful two-way dialogue. Canada's ability to do so was constrained by the manner in which its representatives on the Crown consultation team implemented their mandate. For the most part, Canada's representatives limited their mandate to listening to and recording the concerns of the Indigenous applicants and then transmitting those concerns to the decision-makers.³⁶⁷

The Court also stressed the importance of considering Aboriginal peoples' input in forming accommodation. The Court indicated that the government should have considered the environmental impact assessments presented by the Tsleil-Waututh and Stó:lō while considering possible accommodations measures. This aspect of the decision in *Tsleil-Waututh* casts a positive light on the duty to consult.

However, the *Tsleil-Waututh* case also shows the limitations of the duty to consult. The decision of the court in this case retains the aspect of the duty to consult, considering it as one requiring consultation and possible accommodation and not Aboriginal consent.³⁶⁸ The government can proceed with a planned action, not minding Aboriginal opposition, once the specified procedural standards are reached. Accommodation which fails to achieve consent (and, indeed, is not even aimed at it), therefore, can "further the objective of reconciliation."³⁶⁹ This limitation may appear appropriate to the opposition of the legal arguments on advancing a consent framework, but the duty to consult regime does not provide "legal certainty."³⁷⁰ Although the Supreme Court has specified the rules for assessing whether adequate consultations are met, and the *Tsleil-Waututh* case also seems to have provided further guidance, "decisions will always be highly fact-

³⁶⁵ Boutilier, *supra* note 321 at 10.

³⁶⁶ *Tsleil-Waututh Nation v. Canada (Attorney General)* 2018 FCA 153 at para 6 [*Tsleil-Waututh Nation*].

³⁶⁷ *Ibid* at paras 558, 259.

³⁶⁸ *Ibid* at 772.

³⁶⁹ Hamilton, *supra* note 210 at 4.

³⁷⁰ *Ibid*.

specific.”³⁷¹ This gives rise to situations where parties are not sure of whether a consultation process is adequate until it is determined by the court.

The Crown may approve a project without obtaining Aboriginal consent. However, it is also important to consider that such a project may remain subject to legal action, without a certain outcome. Litigation in the area of the duty to consult can be time-consuming. The cost of litigation and the possible delay of a project may raise the initial capital for the project, resulting in a circumstance where the proponent could lose confidence in a project.³⁷² Uncertainties relating to Aboriginal rights in the areas of the legal duty could be seen as a disincentive for investors. For a project that has been on since 2013 to be cancelled by the Court at a much later stage causes negative impacts on “investors’ perceptions of risks” and on the ability to encourage investment.³⁷³

Policies developing domestic laws to align with the *UNDRIP* or FPIC, in particular, are in the conception stages. British Columbia, for example, has passed legislation to operationalize the *UNDRIP*—the British Columbia *Declaration on the Rights of Indigenous Peoples Act (DRIPA)*. The legislation specifies a process to bring British Columbia’s laws in line with the *UNDRIP*. British Columbia’s *DRIPA* states that “in consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration.”³⁷⁴

Furthermore, there are some instances where the government, Aboriginal peoples and proponents have developed agreements that mirror their conceived approach to applying the *UNDRIP* and its FPIC principle. For instance, British Columbia and many Aboriginal peoples have formed a “consent-based process for aquaculture in the Broughton Archipelago.” British Columbia has also completed an innovative agreement with the *shíshálh Nation* that is aimed at directing “consent-based decision-making processes.”³⁷⁵

³⁷¹ *Ibid.*

³⁷² Malcolm Lavoie, *Assessing the Duty to Consult* (Vancouver: Fraser Institute, 2019) at 13 [Lavoie].

³⁷³ *Ibid.*

³⁷⁴ Legislative Assembly of British Columbia, *Bill 41 – 2019: Declaration on the Rights of Indigenous Peoples Act* <<https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/4th-session/bills/first-reading/gov41-1>> (accessed December 17, 2019).

³⁷⁵ Roshan Danesh & Robert McPhee, “Operationalizing Indigenous Consent through Land-Use Planning” (2019) 29 IRPP Insight Montreal: Institute for Research on Public Policy at 6 [Danesh & McPhee].

Consent should also be seen as a demonstration of a good relationship between the Crown and Aboriginal peoples, not just as an extension of the extant structure of the duty to consult. The result of this approach is a “focus on structures, including dispute resolution mechanisms, that govern how two or more sovereigns will address matters regarding lands and resources where both (or all) have decisions to make and legal orders that apply.”³⁷⁶

Following the above, it is important to address at this juncture that some may argue that a consent standard could result in endless negotiations, making it impossible for the Crown to take relevant decisions affecting the larger society. This argument overlooks the point that consent is not to be interpreted as imposing on Canada an absolute obligation to obtain Aboriginal consent. Conversely, for the Crown to effectively protect Aboriginal rights, obtaining Aboriginal consent should not be interpreted in an overly restrictive manner. Additionally, while the case law that gives the Crown the power of unilateral infringement appears suited to prevent interminable decision-making processes, evidence has shown that court proceedings which Aboriginal peoples do not perceive as legitimate often lead to endless disputes.³⁷⁷ As Lavoie puts it, “the power to delay and generate legal uncertainty is potentially just as effective as a formal veto power. Even in the absence of a formal veto right, then, the duty to consult can potentially operate as a *de facto* veto.”³⁷⁸

5.3 Finding the Path

It has been stated earlier that FPIC has no formal binding force in Canada. However, FPIC could have a positive influence on Canadian law. Canada should encourage a greater consultation process aimed at consent expectations. This section discusses three ways in which consultation processes could function to pursue this goal: further developing the consultation jurisprudence to focus on consent as an aim; government co-developing consultation policies and practices with Aboriginal peoples; and more informed consent in securing Aboriginal approval through agreements negotiated by project proponents.

³⁷⁶ *Ibid.*, at 9, 10.

³⁷⁷ Hamilton & Nichols, *supra* note 137 at 758.

³⁷⁸ Lavoie, *supra* note 372 at 14.

5.3.1 Extending Consultation Jurisprudence

The courts serve as one of the forums through which Aboriginal peoples can seek help to resolve disagreements in relation to Aboriginal rights claims and protection of their traditional lands. Canadian courts can assist the Crown and Aboriginal peoples to develop their relationships in a new way regarding section 35. The Supreme Court has also stated that the constitution is not a straitjacket. Therefore the Court in itself is not constrained by the “limits of originalism”- “the question of what the drafters and legislators imagined themselves to be doing at the time of drafting does not determine the future of the constitutional order.”³⁷⁹ Consequently, the Supreme Court can return to its interpretative method to section 35 as it relates to the duty to consult and its grand purpose and describe it in a way that would allow Crown to negotiate with Aboriginal peoples who have been in occupation and possession of their traditional territory that the government wished to take.

The courts could improve on the duty to consult jurisprudence to provide directions about the consultation processes more consistent with the underlying principles of the doctrine. While the duty to consult has evolved from the trilogy cases to the recent *Mikisew Cree*, 2018, there is room for the jurisprudence to develop further even under the limitations of the system.³⁸⁰ For instance, it has been held that the duty to consult is not activated by past impacts, and it is not a vehicle to resolve past grievances.³⁸¹ But in what seems to be an exception to these rules, the Court in *Rio Tinto* referred to potential consideration of the effect of cumulative encroachment of a series of development as part of the context in addressing the effect of a present/proposed government’s action.³⁸² Besides, the *Haida Nation* case law was also extended by the Court in *Clyde River* and *Chippewas of the Thames* as the Court clarified that the duty to consult could be discharged by a governmental body or a regulatory agency.³⁸³ With the decisions in *Clyde River* and *Chippewas of the Thames*, it is now clear that depending solely on an environmental

³⁷⁹ Hamilton & Nichols, *supra* note 137 at 750.

³⁸⁰ *Haida Nation*, *supra* note 1; *Mikisew Cree*, 2018, *supra* note 2

³⁸¹ *Rio Tinto*, *supra* note 103 at para 83; *Chippewas of the Thames*, *supra* note 30 at para. 41.

³⁸² *Rio Tinto*, at para 49.

³⁸³ *Chippewas of the Thames*, *supra* note 30 at para 32; *Clyde River*, *supra* note 30 at para 30.

assessment process or a document that does not explain the significance of a process would not suffice.³⁸⁴

Flowing from the above, the Canadian courts can encourage the development of consultation jurisprudence by taking a generous approach in resolving Crown-Aboriginal disputes. Adopting interpretation that is influenced by FPIC values while assessing how the adequacy of consultation and accommodation could create a flexible foundation for dispute resolution. This approach will generate possibilities and effective methods to negotiate in decision making in the context of the duty to consult.

In developing the legal doctrine, the Canadian courts might investigate the attitude of the Crown representative in future consultation processes. The court may also delve into the question as to how the process was designed- whether the affected Aboriginal peoples were given the opportunity to make input as to how the process may be carried out and to the extent to which the parties made collaborative efforts in the process.³⁸⁵ The Court may ask questions such as:

- i. Whether an affected Aboriginal society was engaged at an early stage?
- ii. Whether consultation process was designed by both parties? Whether the relevant documents were made easily accessible to Aboriginal community?
- iii. Whether the affected Aboriginal community is properly informed of the project and its implications?
- iv. Whether the process was carried out in a manner that supports an advance in the Crown-Aboriginal relations?

In asking questions (i) – (iv), the court is supporting the development of effective Crown-Aboriginal relations. The focus of these interrogations does not stop at the general requirement of whether there was adequate consultation. It investigates the approach taken by the parties in arriving at decisions – an approach that facilitate a sincere listening to Aboriginal perspectives. The relevance of these questions is that it helps to form a decision-making process that considers

³⁸⁴ *Clyde River, ibid.* at para. 46, 49.

³⁸⁵ Manley-Casimir conceived a number of questions the Court could ask to arrive at decision that creates some progressive standards for consultation. See specifically, Manley-Casimir, *supra* note 216 at 356-60.

the perspectives and addresses the concerns of each party involved. Even within the operational restrictions of the Courts, considering both Aboriginal and non-Aboriginal perspectives could lead the Courts to formulate a standard that becomes mutually accepted by both parties. This will build prospects and genuine ways for a flexible framework for negotiations in the areas of the duty to consult and accommodate.

In applying question (v), the Court would be encouraging parties to avoid relations that create damaging implications for Crown-Aboriginal relations. Here, the Court would be considering the process and the decisions reached by the government in defining if a consultation process supports healthy Crown-Aboriginal relations.

These questions may lead the Courts to analyze a concept of consultation aiming at consent standard. This would create a standard for proactive negotiations, restore sense of respect between parties, and make it difficult for the government to take on an approach of Aboriginal consultation that is minimal or employed as a matter of courtesy. Above all, these considerations would likely inspire parties to form a negotiation mechanism that is properly informed and not perceived as that which involves imposition of one parties will on another or violence or force.

Furthermore, judges can take on an approach that acknowledges the options of potential reformation of the current structures and rebuilding Crown-Aboriginal relation. The Canadian courts could, for instance, pose a question as to the legitimacy of the Crown's assertion of sovereignty without demanding that the Canadian state disassembles or discontinues operating under the presumption that the is Crown is sovereign.³⁸⁶ This judicial inquiring could result in establishing better dispute resolution mechanisms through mutual agreement. This could promote negotiations that can change Crown-Aboriginal relations from those characterized by "pressure" and "demonstration" to those founded on shared respect.

5.3.2 Developing Consultation Procedures and Aboriginal Protocols

The limitations and the uncertainty around the duty to consult are illustrated by the issues affecting the consultation processes in developments. These difficulties seem to be growing

³⁸⁶ Hamilton & Nichols, *supra* note 137 at 751.

significantly by the day. One of the main reasons for these challenges is related to failure to provide processes that allow for practical recognition and respect for Aboriginal peoples' rights and legal structures.³⁸⁷ Government policies and laws for future developments may fail to achieve better Crown-Aboriginal relationships if the government does not think of better ways to make significant changes in the policies to promote reconciliation, which prioritizes long-lasting partnership with Aboriginal communities.

5.3.2.1 Research and Development Stage

Research and development is a relevant stage before any significant development or project. For example, SMR deployment will require the collection of “expertise and knowledge among the Canadian nuclear community.” The Canadian government should conduct not just a well-organized R&D program, but also an all-inclusive R&D program in carrying out fundamental research needed for “capability development and deployment of SMRs in new applications and regions.”³⁸⁸

The view that Aboriginal groups are more opposed to SMR activities poses major challenges. There is a mindset that traditional plants raise safety and health issues, and SMRs could raise more concerns due to their novelty. Early and meaningful Aboriginal consultation would play a major role in clarifying that SMR risks could be lower than the risks from some “competing energy sources.”³⁸⁹

The government should not just pursue a routinely foundational R&D. Rather, it should highlight the importance of Aboriginal engagement and training at this early stage and also implement it. This could ensure the successful development and deployment of new nuclear technologies. Aboriginal engagement at this early stage will create an opportunity for the basic understanding of Aboriginal concerns and how to align them with the development program. This will enhance effective engagements all through the development of SMR, and not just a

³⁸⁷ Danesh & McPhee, *supra* note 375 at 15.

³⁸⁸ SMR Roadmap-TWG, *supra* note 14 at 66.

³⁸⁹ Cass R Sunstein, “Beyond the Precautionary Principle” (2003) 151 U Penn L Rev 1003 at 1051.

model of consultation that will be carried out at the time the placement of the technology is required.³⁹⁰

The above shows the need for Aboriginal involvement at the R&D stage, but there seems not to be much Aboriginal engagement at this stage. For example, on November 24, 2017, the CNSC held a Stakeholders Workshop Report: Application of the Graded Approach in Regulating SMRs.³⁹¹ Eighteen organizations participated in that Workshop, whereas there was no Aboriginal representation. In 2018, a number of Aboriginal workshops were held as a relevant aspect of the SMR development plan. The Indigenous and Public Engagement Working Group (IPEWG) reported that these sets of workshops were conducted with only a subset of Aboriginal governments' leaders in New Brunswick, Alberta, and Nunavut. The essence of the early dialogue was to learn potential Aboriginal views on the development of SMRs and to recognize suitable modes for further engagement.³⁹² While the IPEWG specified that the workshops were a significant early step and that much was learned, the IPEWG, however, indicated that the workshop was not all-encompassing and that there is much work to do to show "meaningful, authentic and ongoing engagement about the potential of SMRs in Canada..."³⁹³

5.3.2.2 Joint Development of Consultation Policies

One of the reasons for the challenges around the duty to consult is the failure to incorporate Aboriginal legal perspectives into government policies. The CNSC's *Codification of Current Practice* on duty to consult, for instance, merely codifies the case law without more.³⁹⁴ The *Codification of Current Practice* provides an opportunity for the CNSC and Aboriginal peoples to develop an FPIC regime by genuinely co-framing the policy as a government-to-government

³⁹⁰ SMR Roadmap-TWG, *supra* note 14 at 67.

³⁹¹ Canada, Canadian Nuclear Safety Commission, *Stakeholder Workshop Report: Application of the Graded Approach in Regulating Small Modular Reactors* (November 24, 2017), online: <<https://nuclearsafety.gc.ca/eng/acts-and-regulations/consultation/history/workshop-report-regulating-small-modular-reactors.cfm#sec3>> (Accessed December 20, 2019).

³⁹² SMR Roadmap-IPEWG, *supra* note 14 at 1

³⁹³ *Ibid.*

³⁹⁴ CNSC, *Codification of Current Practice: CNSC Commitment to Aboriginal Consultation* (2011) at 2, online: <http://nuclearsafety.gc.ca/eng/pdfs/duty-to-consult/August-2011-Codification-of-Current-Practice-CNSC-Commitment-to-Aboriginal-Consultation_e.pdf> [CNSC, *Codification of Current Practice*].

decision-making process. This will assist the government and Aboriginal peoples to create an all-inclusive process.

A long-lasting foundation for establishing FPIC can be created by coming to an agreement that will guide governments, Aboriginal communities and stakeholders for a long period, “without consideration of a particular project.”³⁹⁵ The government has to consider Crown-Aboriginal joint development of consultation policies. There is hope that the duty consult is one of the major platforms in which a consent standard can be promoted, while providing greater certainty for implementation of the legal doctrine and limiting the growing number of disputes associated with the duty to consult. Consent could help parties to find common results and determinations. It creates a nation-to-nation structure where negotiating powers are balanced and “authorities are aligned,” and dispute resolution mechanisms are created to resolve disputes.³⁹⁶

A consent-oriented approach to consultation process will, therefore, involve a process where agreement is reached considering the standards which should be respected in given circumstances. It will determine the particular project to be undertaken and whether there are activities prohibited within a particular location, while at the same time providing reasons for such prohibitions. Where such mutual understating is developed, it becomes a keystone for operationalizing consent values to direct the government and Aboriginal communities and proponents in all projects.³⁹⁷ The rationale provided by D. White III as how consent may be implemented could be used in this context:

[Consultation policies] is a process where critical, early decisions regarding free, prior and informed consent can be worked out... If [the duty to consult] processes are properly co-designed as government-to-government decision-making processes between Crown and [Aboriginal] governments; if joint decisions will be made and implemented about what kinds of activities may occur where in a territory; if we agree on what parameters, what values and interests must be protected, and what processes and measures must be met for proposals to proceed in each area, then the foundation for decisions based on consent is set.³⁹⁸

Additionally, the possibilities of Aboriginal opposition as a result of a perceived power imbalance support the rationale for considering Aboriginal consent in future projects. In many

³⁹⁵ Danesh & McPhee, *supra* note 375 at 15.

³⁹⁶ *Ibid.*

³⁹⁷ *Ibid.*

³⁹⁸ D. White III, “Island Voices: Land-Use Planning Is a Path to Certainty,” *Times Colonist* (February 3, 2019)

cases, the power imbalance in the duty to consult framework seems to cause a stalemate in the development of Crown-Aboriginal relation. If Aboriginal peoples continue to believe that they are not offered the opportunity to participate in a “consensus-building efforts” because all power resides with the Crown, they may lose interest in active involvement in negotiation. It has been noted earlier that the Crown may force its decision on Aboriginal peoples if parties are unable to reach an agreement. In this case, Aboriginal peoples could decide not to be committed to the decision, or even reject it outrightly. What this means for both parties is prolonged disputes.³⁹⁹ In the current standard of consultation, Aboriginal communities believe they are weak. Consequently, they will hardly trust a negotiation process in which they believe that, in any event, the Crown has the right to make the ultimate decision. Hence, it is in recognizing a consent standard that the weaker party in the consultation process could have the feeling that a meaningful negotiation and dialogue could be achieved. This could minimize unilateral Crown power.⁴⁰⁰

Also, Aboriginal communities can develop consultation protocols, which show a clear outline of Aboriginal interests and expectations. This could be done in collaboration with the government such that it could consistency in parties’ expectations. Aboriginal protocols serve as clear roadmaps for Aboriginal engagement—they offer a favourable approach to better clarity for consultation responsibilities.⁴⁰¹ Where there are inconsistencies that may lead to conflicts between the Aboriginal consultation protocols and consultation policies, parties will be required to negotiate on how to make some changes to the processes to promote a consistent form of outcome.

5.3.3 Canadian Industry and Affected Aboriginal Communities

It makes economic sense for the nuclear industry to incorporate Aboriginal consent in their policies for new development. Consent, which takes the form of “shared value,” provides great opportunities for industry to advance favourably in Canadian resource and energy development.

³⁹⁹ Imai-CCV, *supra* note 331 at 12.

⁴⁰⁰ *Ibid*, at 13: “It is through recognition of the necessity of consent that [I]ndigenous community will have power that can be a balance to the superior economic power of the [industries] and the superior political power of government.”

⁴⁰¹ Lavoie, *supra* note 372 at 33.

Proponents proposing to carry out SMR activities on Aboriginal traditional territories could seek Aboriginal consent through economic relationships that reconcile proponents' lasting interests with the interests of the affected Aboriginal groups. This could reduce Aboriginal disruptions of projects and create cumulative shared value and ultimately minimize reputational damage.⁴⁰²

First, proponents of future developments should recognize that Aboriginal communities have a distinct set of rights and traditions. In addition to their distinct legal status and relation with the Crown, Aboriginal peoples also have or desire to enjoy different levels of autonomy. While various aspects of Aboriginal governments have fuller autonomy, several others have to act within the framework of Canadian legislation. Many Aboriginal governments also have the capacity to enter into contracts with developers for their membership. Before any important decisions is passed, it must have the approval of a majority of Council at a meeting supported by the resolution of a band council.⁴⁰³ Decisions made by the Chief and Council may require Aboriginal communities to vote to ratify such decisions. In this regard, developers need to recognize different levels of complexities within the Aboriginal political structure, different agendas, "family loyalties and "community pressure points."⁴⁰⁴ These play an important role in recognizing how different Aboriginal groups will perceive a future development, especially a novel nuclear technology, and the resulting commercial relationship.

It is important to state that Aboriginal communities as self-governing peoples operate largely within the confines of the Canadian legal structure. Aboriginal governments include elected bodies saddled with the responsibilities and similar issues as municipal governments.⁴⁰⁵ For commercial development arrangements, most Aboriginal groups in Canada are represented by their Chiefs and Council, including their advisors.⁴⁰⁶ Resource and energy proponents could effectively engage the elders within various Aboriginal communities, as well as the larger Aboriginal communities to reach a consensus agreement. The leadership have a role to play in making sure that the terms of contracts are respected and ensuring accomplishment of development even when there is a change in government or "lack of separation between elected

⁴⁰² William M. Laurin & Joann P. Jamieson, "Aligning Energy Development with the Interests of Aboriginal Peoples in Canada" (2015) 53 Alberta L Rev 453 at 470 - 479 [*Laurin & Jamieson*].

⁴⁰³ *Ibid* at 471.

⁴⁰⁴ *Ibid*.

⁴⁰⁵ *Ibid* at 472.

⁴⁰⁶ *Ibid*.

officials and the business administration function, and transparency issues with individual elected officials.”⁴⁰⁷ Aboriginal elders and communities will generally support a commercial agreement that aligns with their interests, notwithstanding the usual short office terms of their representative.⁴⁰⁸ The agreements between host Aboriginal communities and proponents are usually done through Impact Benefit agreements (IBAs). A negotiated agreement could play a relevant role in fulfilling the legal expressions of FPIC in SMR development, but it should be signed after the IA process has been completed.⁴⁰⁹

IBAs are private agreements executed between project proponents and one or more Aboriginal communities.⁴¹⁰ IBAs aim to reduce “uncertainties over the legality and the legitimacy” of a proposed development. Proponents engage directly with Aboriginal communities to negotiate for a compensatory package, which generally contains measures for mitigating the likely impacts of a proposed project and economic profit in order to secure Aboriginal consent.⁴¹¹ In effect, project proponents have come to see IBAs as an essential vehicle for acquiring Aboriginal consent for projects in Canada. Parties who execute IBAs, for the most part, are ensuring to one another that they are committed to the terms of the negotiated contract—the expectations are that the potentially affected Aboriginal peoples’ approval of the given project to proceed on their traditional lands, while developers provide financial benefits or compensations to the affected Aboriginal communities. IBAs may be considered as an important mechanism for securing Aboriginal approval for projects to proceed on their land. It also appears as a way to ensure that affected Aboriginal peoples have been properly engaged. In principle, IBAs aim to provide some level of legal certainty for development. They often include an Indigenous commitment not to oppose a particular development or to initiate litigation outside an agreed dispute resolution process. However, project developments are often involved in major legal challenges, suggesting that the availability of IBAs has not solved all certainty issues.⁴¹²

⁴⁰⁷ *Ibid* at 473.

⁴⁰⁸ *Ibid*.

⁴⁰⁹ Martin Papillon & Thierry Rodon, “Indigenous Consent and Natural Resource Extraction: Foundations for a Made-in-Canada Approach” (2017) 16 IRPP Insight 13[Papillon & Rodon-IC].

⁴¹⁰ Brad Gilmour & Bruce Mellett, “The Role of Impact and Benefits Agreements in the Resolution of Project Issues with First Nations” (2013) 51 Alberta L Rev 385 at 387.

⁴¹¹ Papillon & Rodon-IC, *supra* note 409 at 12; Laurin & Jamieson, *supra* note 402 at 458: Some of the benefits contained in IBAs may include “education and training, capacity building, community investment funding, training and employment provisions, business opportunities, and in some cases, revenue sharing or participation rights.”

⁴¹² Laurin & Jamieson, *ibid* at 458.

Even more challenging are the limitations to IBAs as a way of implementing FPIC. Most IBAs are usually negotiated without sufficient community contributions as they are kept confidential, although parties involved are moving away from this practice.⁴¹³ Also, those IBAs which are less confidential only become available after they have been ratified. This could mean that most IBAs are likely to be approved or implemented without the communities having a comprehensive knowledge of what they contain. This certainly does not entail the concept of informed consent. It is also Aboriginal legal representatives as well as proponents that are mostly involved in IBAs negotiations. The negotiation in this regard may create a negative process that is largely argumentative and generally dense.⁴¹⁴

IBA negotiations are generally founded on the notion that a given project will be approved. This presents a situation where the proponent places more emphasis on providing a compensation package as the price for obtaining Aboriginal consent to get the project approved. This, consequently, places less emphasis on exchanging information to create a foundation for informed consent. Negotiating compensation certainly “creates a focus on quantifiable aspects (monetary compensation, share of profits, jobs and so on) rather than on more abstract but equally important considerations, such as the long-term social impact of the project or its cumulative environmental impact.”⁴¹⁵

Some project proponents often set their minds on securing Aboriginal approval as quickly as possible to meet the timeframe for completing a given project. Thereby, IBAs could often be concluded and Aboriginal approval granted before Impact Assessments (IA) are concluded.⁴¹⁶ Project proponents who require IBAs to show Aboriginal approval to attract investors often adopt this practice. In other words, this means that Aboriginal communities may grant consent for a project without being informed of the full impacts of the project.⁴¹⁷ A negotiated agreement

⁴¹³ Papillon & Rodon-IC, *supra* note 409 at 12.

⁴¹⁴ *Ibid.*

⁴¹⁵ *Ibid.*

⁴¹⁶ *Ibid* at 13

⁴¹⁷ *Ibid.*

would not fulfill the legal expressions of FPIC where IBAs are signed before the completion of the IA process.⁴¹⁸

Furthermore, unlike FPIC which is implemented by the states, IBAs are negotiated by proponents. Although IBAs may indicate approval from Aboriginal communities, it could be difficult to sufficiently determine if consent in the negotiated agreement is actually free, prior and informed, particularly if the contents of the IBAs remain confidential. Therefore great caution should be taken as not to “equate the negotiation of an IBA with FPIC.”⁴¹⁹ IBAs could be a useful aspect of FPIC. However, they are not by themselves adequate to express FPIC. The goal of IBAs is especially linked to economic compensations. FPIC has a broader goal, which includes not just the economic benefits for the potentially affected, but also the protection of their spiritual, cultural, and traditions values.⁴²⁰

IBAs could serve as an important tool for assessing Aboriginal approval for SMR projects, considering the potential impacts associated with the nuclear technology. But, then, IBAs largely focus on economic benefits that may not address the broader Aboriginal concerns. More so, IBAs are in general “elite-driven” and have the risk of not adequately including Aboriginal input, especially if the affected communities are not adequately informed.⁴²¹ Hence, IBAs regarding future developments should include a genuine and effective deliberation process in the Aboriginal communities—the negotiation process should be sufficiently transparent. Thus, negotiated agreements for future developments should be signed if all important information relating to the project, including the environmental and social impacts are accurately assessed and accounted for and made available to the affected communities.

5.4 Conclusion

The duty to consult is a judicially framed principle to protect Aboriginal rights recognized and affirmed by section 35 of the *Constitution Act, 1982*. The duty to consult is expected to serve an

⁴¹⁸ *Ibid.*

⁴¹⁹ *Ibid.*

⁴²⁰ *Ibid.*

⁴²¹ *Ibid* at 7.

honourable purpose in reconciling pre-existing Aboriginal claims with the assertion of Crown sovereignty.⁴²² The Supreme Court of Canada has repeatedly indicated that section 35 is aimed at the reconciliation of Aboriginal and non-Aboriginal societies in Canada in a mutually respectful lasting relationship. The duty to consult is not sufficiently inclusive or protective of Aboriginal peoples' rights. The duty to consult as presently structured seems to allow the government to approach the consultation processes merely to reach the minimal requirements, without necessarily achieving meaningful dialogue. This approach is at odds with the promise of reconciliation as the overarching purpose of section 35(1) of the constitution.

The Supreme Court of Canada's case law seemingly shows an effort on the part of the Court to preserve the Crown's assertion of sovereignty around the constitutional order in framing the duty to consult.⁴²³ As it turns out, the government is responsible for assessing the strength of the Aboriginal claim. The Crown also determines Aboriginal concerns and places Aboriginal consultation within the spectrum analysis- a process that takes time, sometimes, even longer than anticipated. Consultation with Aboriginal communities may also require that the Crown incur costs in providing resources for meaningful Aboriginal participation. Because of these issues, there could be inherent bias on the part of the government's agencies to assess Aboriginal concerns as minimal, an approach unlikely to support social or political harmony between the Crown and Aboriginal peoples.⁴²⁴

However, the example at issue, one in which the novelty of the technology offers the chance to get things right from the beginning, helps to highlight that reconciliation is unlikely to be met under the currently constituted duty to consult. Many countries, including Canada, are proposing to transition to SMR technologies because of the numerous benefits associated with it, particularly because of its potential to reduce GHG emissions. SMRs are advanced technologies that have unique features, and are anticipated to supply energy to smaller electrical grids or

⁴²² *Van der Peet*, *supra* note 4 at para 36.

⁴²³ *Hamilton & Nichols*, *supra* note 137.

⁴²⁴ *Walters-The Jurisprudence of Reconciliation*, *supra* note 38 at 185.

remote off-grid regions in Canada, many of which are in areas largely populated by Aboriginal peoples.⁴²⁵

Reconciliation supports the Crown-Aboriginal relationship and seeks to foster long-term peaceful co-existence between Aboriginal and non-Aboriginal societies in Canada. Many developments in Canada are potentially related to the rights and interests of Aboriginal peoples in Canada. An inadequately discharged consultation process could result in litigation relating to consultation or infringement, leading to an endless search for the ultimate goal of reconciliation and delay in implementing a proposal project. Aboriginal acceptance through meaningful consultation and negotiation will play a significant role in the possible outcome of re-building Crown-Aboriginal relationship such that it fosters reconciliation. A unilateral Crown action in decision-making does not reflect the idea of reconciliation.⁴²⁶ Aboriginal peoples should not be the only party doing all the reconciling. Therefore taking on a consent standard in the decision-making process for future projects would ensure that Aboriginal peoples participate effectively in decisions concerning their traditional land and that future development does not suffer preventable opposition.

There is hope that the Courts and the Crown could take a lead in the ongoing goal to achieve a mutually beneficial Crown-Aboriginal relationship in Canada. There is a need to go beyond the usual technical approach to the duty to consult to attain this goal. Doing so is critical in future developments, which could have potential impacts on Aboriginal peoples' rights under section 35. For a project to remain subject to litigation or unnecessarily delay without any positive/certain outcome is something Canada must avoid. This could prolong the timeline set for a project and may even lead to cancellation by the court after much time and resources have invested in the project. This is enough to create negative impacts on "investors' perceptions of risks" and the ability to encourage investment.⁴²⁷ A consultation process that aims towards reaching an agreement could encourage a diligent approach to consultation and enable Canada to develop an all-inclusive approach to reconciliation that recognizes the relationships between Aboriginal and non-Aboriginal Canadians.

⁴²⁵ CNSC Discussion Paper, *supra* note 10 at 1; see generally, Todreas, *supra* note 10.

⁴²⁶ Ritchie, *supra* note 36 at 407.

⁴²⁷ Lavoie, *supra* note 372 at 13.

The judiciary has a role to play to advance Crown-Aboriginal relations in line with section 35. It has been stated earlier that the Supreme Court of Canada has confirmed that the constitution is not a straitjacket. The Court should therefore not restrict its functions in guiding parties in the ongoing discussions on advancement of the duty to consult. When the duty to consult issues end up litigated before the courts, the judges arrive at decisions choosing from various interpretations of the law “which embody the values of different normative communities.”⁴²⁸ There is an opportunity in that. In making decisions, the judges could abandon interpretations of the law that lead to persistent conflict and adopt alternative legal interpretations that allow for peaceful coexistence.⁴²⁹

The duty to consult failed to incorporate Aboriginal legal traditions in governments’ policies.⁴³⁰ The *Codification of Current Practice* and the CNSC’s REGDOC 3.3.2 (Aboriginal engagement) for example, creates a chance for the CNSC and Aboriginal peoples to develop an FPIC framework by practically co-framing the policies as government-to-government decision-making process. This will assist the government and Aboriginal peoples to create an all-inclusive process, legal certainty, and procedural clarity.⁴³¹ If Aboriginal peoples effectively participate in creating the frameworks that govern Crown-Aboriginal relations, they will be less likely to oppose government decisions based on those rules.

A negotiated agreement could play an important role in meeting the legal expressions of FPIC in SMR development. IBAs could reduce uncertainties around the questions of the legitimacy of an intended development.⁴³² This thesis, however, argued that it is important that IBAs are signed after all important information relating to the project, including the environmental and social impacts are accurately assessed and accounted for and made available to the affected communities.⁴³³

Aboriginal peoples are not necessarily opposed to development. Those open to it, though, are determined to protect their territories, preserve their culture and custom for their continued survival as peoples, and pass on their territories, cultures, and customs to future generations.

⁴²⁸ Manley-Casimir, *supra* note 216 at 347.

⁴²⁹ Hamilton & Nichols, *supra* note 137 at 750.

⁴³⁰ CNSC, *Codification of Current Practice*, *supra* note 394 at 2 *Ibid.*

⁴³¹ Hamilton & Nichols, *supra* note 137 at 760.

⁴³² Papillon & Rodon-IC, *supra* note 409 at 12.

⁴³³ *Ibid.*, at 13.

Besides the complexity, there is an opportunity to engage with Aboriginal peoples. More so, proponents could benefit from reduced risk of Aboriginal opposition, the likelihood of litigation and reputational damage, and eventually, increase the value of future development like SMRs projects.⁴³⁴

Finally, as opposed to the minimum-requirement approach to implementing the duty to consult, consultations for future projects should take up an approach that does not involve a unilateral exercise of power. Future development involving Aboriginal engagement provides an opportunity to get things right from the early stage. Expanding the *Haida Nation* case law is essential to accomplish the protective and reconciliation purposes of section 35—the fundamental goal of section 35 and the underlying principle in the law. Applying a standard that aims at FPIC would better respect the fundamental law on the duty to consult and thereby advance Crown-Aboriginal relations. Therefore, expanding consultation jurisprudence, co-developing consultation policies and practices, and improving procedures for obtaining Aboriginal approval through agreements negotiated by industry could support this goal.

⁴³⁴ Hanna & Vanclay, *supra* note 326 at 154.

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APPENDIX: The CNSC's Approach to Aboriginal Engagement

An Overview of the CNSC

The CNSC was established by the *Nuclear Safety and Control Act* (NSCA) to “regulate the development, production and the use of nuclear energy” and nuclear substance in Canada,⁴³⁵ Its past regulatory activity remains illustrative even after recent changes that affect its role. Prior to recent changes to implement the new impact assessment system, within this framework, the CNSC has regulated nuclear activities, including the deployment of SMRs, in Canada. The CNSC has had the obligation to establish a regulatory framework corresponding to international standards for human health and a safe environment.⁴³⁶ The CNSC has developed regulations that set out the relevant requirements to be complied with before applicants can obtain a licence for construction, deployment, operation, and decommission. The CNSC has been empowered to issue an applicant a license if the applicant is “qualified to carry on the activity that the licence will authorize the licensee to carry on” and if the applicant makes “adequate provisions for the protection of the environment, the health and safety of persons and the maintenance of national security and measures required to implement international obligations to which Canada has agreed.”⁴³⁷

The CNSC is required to use “risk-informed approaches” to evaluate requirements so that they are proportional to the activity or facility’s risk profile.”⁴³⁸ As part of its obligations, the CNSC is required to take measures to “limit to a reasonable level ...the risk to national security, the health and safety of persons and the environment that are associated with the development, production and use of nuclear energy.” The CNSC has been expected to issue licenses to applicants qualified to undertake the nuclear activity and to meet Canada’s commitment to international best practice.⁴³⁹

⁴³⁵ *Nuclear Safety and Control Act*, SC 1997, c 9 at ss 8(1) & 9 [NSCA].

⁴³⁶ *Ibid.*, at s 9.

⁴³⁷ *Ibid.*, at s 24(4) (a) and (b).

⁴³⁸ S. Herstead, D. Miller & M. de Vos, “Determining Appropriate Licensing Strategies for Novel Nuclear Technologies in Canada” Paper Delivered at the 38th Annual Conference of the Canadian Nuclear Society and 42nd Annual Student Conference, Saskatoon, Canada (June 3-6, 2018).

⁴³⁹ NSCA, *supra* note 435, s 3(a)–(b).

Furthermore, the CNSC established a regime that sought to fulfill its consultation duty to the Aboriginal peoples and the public. Its regulatory framework included numerous provisions on consultation which could be juxtaposed with the courts' decisions on duty to consult. As an independent administrative tribunal, CNSC recognizes and understands the importance of Aboriginal consultation as part of its regulatory functions. CNSC declared its commitment to understanding the significance of consulting with Canada's Aboriginal communities to build mutual relationships with them.⁴⁴⁰ The CNSC also confirms "that all its licensing decisions under the Nuclear Safety and Control Act and environmental assessment decisions under the *Canadian Environmental Assessment Act* uphold the honour of the Crown and consider Aboriginal peoples' potential or established Aboriginal or treaty rights pursuant to section 35 of the *Constitution Act, 1982*."⁴⁴¹

Regulatory Documents for SMR Licence Applications

The CNSC has different types of regulatory documents ("REGDOC") that set out requirements and guidance on what must be fulfilled prior to obtaining a license for nuclear activities. *REGDOC* describe to licensees and applicants what must be accomplished to satisfy the conditions for the regulation of nuclear activities under the *NSCA*. REGDOC-1.1.5⁴⁴² provides the necessary requirements and guidance needed for submission of licensing application to the CNSC for SMR facilities in Canada. REGDOC-1.1.5 also "identifies considerations that the CNSC takes into account when assessing the adequacy of submissions." It is noteworthy that REGDOC-1.1.5 is designed to be used "in conjunction with consultations with CNSC staff," in addition to the regulatory documents for site preparation- REGDOC-1.1.1,⁴⁴³ construction-

⁴⁴⁰ See generally, CNSC, *Codification of Current Practice*, *supra* note 394.

⁴⁴¹ *Ibid* at 1. See generally, Canada, Canadian Nuclear Safety Commission, *Public and Aboriginal Engagement: Aboriginal Engagement*, REGDOC-3.2.2 (Ottawa: CNSC, February 2016) [REGDOC-3.2.2]; Canada, Canadian Nuclear Safety Commission, *Public and Aboriginal Engagement: Public Information and Disclosure*, REGDOC-3.2.1 (Ottawa: CNSC, May 2018) for requirements for public engagement.

⁴⁴² Canada, Canadian Nuclear Safety Commission, *Licence Application Guide: Small Modular Reactor Facilities (DRAFT)*, REGDOC-1.1.5 (Ottawa: CNSC, July 2018) [REGDOC-1.1.5]

⁴⁴³ Canada, Canadian Nuclear Safety Commission, *Licence to Prepare Site and Site Evaluation for New Reactor Facilities*, REGDOC-1.1.1 (Ottawa: CNSC, August 2016) [REGDOC-1.1.1].

RD/GD-369,⁴⁴⁴ and operation- REGDOC-1.1.3.⁴⁴⁵ These three documents set out requirements and guidance for an applicant to review prior to submitting a licence application.

Consultation with potentially affected Aboriginal groups would be conducted at five licensing stages: licence to prepare site; construct; operate; modify; decommission or abandon a Class IA facility.⁴⁴⁶ SMRs are within Class IA nuclear facilities and thus licensees must comply with the necessary requirements for application under this class of nuclear facilities. Project proponents have a responsibility to demonstrate that they are qualified to carry on the activity described in the application, and have made “adequate provisions to protect the health, safety and security of persons and the environment.”⁴⁴⁷ A Licence will be issued where licensees have met the requirements set out by the CNSC, for example, for Aboriginal engagement. The level of Aboriginal engagement will vary depending on the licensing stage, the location of the identified site, that is, whether the site is subject to a title claim or falls under areas covered by treaties.

An environmental assessment (EA) (or impacts assessment) may be required before issuing a license for siting. The CNSC was responsible for conducting environmental assessments. Where EA is required, the CNSC will inform the applicant.⁴⁴⁸ The CNSC has the duty to ensure that its licensing decisions within the *NSCA* and the *Canadian Environmental Assessment Act (CEAA)* uphold the honour of the Crown. Also in its duty as a Crown agent, the CNSC may review a vendor’s design through a Vendor design reviews (VDR) process. A VDR pre-licensing process helps to identify and clarify possible “regulatory or technical issues that could arise later in the licensing process...and takes place before a proponent would submit a licence application using the particular design”⁴⁴⁹

⁴⁴⁴ Canada, Canadian Nuclear Safety Commission, *RD/GD-369, Licence Application Guide: Licence to Construct a Nuclear Power Plant* (March, 2014).

⁴⁴⁵ Canada, Canadian Nuclear Safety Commission, *REGDOC-1.1.3, Licence Application Guide: Licence to Operate a Nuclear Power Plant* (August, 2017); *REGDOC-1.1.5, supra* note 442 at 1.

⁴⁴⁶ Class I Nuclear Facilities Regulations, SOR/2000-204, ss 3–8; *NSCA, supra* note 435 at 26(e); *REGDOC-1.1.1, supra* note 443 at 6.

⁴⁴⁷ *REGDOC-1.1.1, ibid*, at 52.

⁴⁴⁸ *REGDOC-1.1.5, supra* note 442 at 1.

⁴⁴⁹ *Ibid*.

It bears noting that currently, Bill C-69 enacts the *Impact Assessment Act (IAA)* which is now the governing legislation for conducting environmental assessment.⁴⁵⁰ The Bill replaces Environmental Assessment Agency with Impact Agency of Canada.⁴⁵¹ Under the *IAA*, the Minister of the Environment has the obligation to refer impact assessments of nuclear activities to a review panel if the project includes activities regulated under the *NSCA*.⁴⁵² The review panel is established by the Minister, including a chairperson and at least two other members.⁴⁵³ The CNSC may use only the impact assessment carried out by the review panel for the purpose of issuing licence to a licensee.⁴⁵⁴

Accordingly, the licensing phases for SMRs would require adequate Aboriginal engagement prior to issuing a licence. The CNSC requirements on the duty to consult are largely provided for in Aboriginal Engagement Regulatory Document (REGDOC-3.2.2).⁴⁵⁵ REGDOC-3.2.2 is an important regulatory document that considers aspects of regulation on Aboriginal engagement.

Aboriginal Engagement

Generally, the CNSC engages with Aboriginal peoples and Canadian society as a whole to address their concerns about a proposed nuclear project. In keeping with its wide-ranging mandate, CNSC is required to account “for the protection of the environment, and the health, safety and security” of Aboriginal peoples.⁴⁵⁶ The *NSCA* does not make provisions for Aboriginal engagement. However, the CNSC’s approach to Aboriginal consultation is found on the *Codification of Current Practice* on duty to consult⁴⁵⁷ and REGDOC-3.2.2. REGDOC-3.2.2 is more detailed in setting out the requirements for Aboriginal consultation. As an agent of the

⁴⁵⁰ Canada, Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2019 [Bill C-69].

⁴⁵¹ Parliament of Canada, *Bill C-69*, online: <parl.ca/DocumentViewer/en/42-1/bill/C-69/royal-assent> (accessed September 24, 2019).

⁴⁵² *Bill C-69, ibid*, cl s 43.

⁴⁵³ *Ibid*, cl s 44.

⁴⁵⁴ *Ibid*, cl s 45.

⁴⁵⁵ REGDOC-3.2.2, *supra* note 441 “identifies requirements for CNSC licensees, with respect to Aboriginal engagement. It also provides guidance and information on conducting Aboriginal engagement activities.”

⁴⁵⁶ CNSC, *Codification of Current Practice*, *supra* note 394 at 2.

⁴⁵⁷ *Ibid*.

Crown, CNSC ensures that REGDOC-3.2.2 is updated to reflect current requirements and most importantly to engage in *best practices* in carrying out its functions.⁴⁵⁸

The CNSC recommends early Aboriginal engagement for licensees in determining if their planned activity has possible adverse effects on potential or established Aboriginal rights and interests thereof. Information obtained by licensees at early stage could inform the CNSC's approach to Aboriginal consultation process.⁴⁵⁹ The CNSC will grant licensees' request for authorization only where licensees conduct a review to determine whether the proposed activity in their application:

- i. could result in impacts to the environment.
- ii. could adversely impact an Aboriginal group's potential or established Aboriginal and/or treaty rights, such as the ability to hunt, trap, fish, gather or conduct cultural ceremonies.⁴⁶⁰

Where it is found that the described activity could adversely impact Aboriginal or treaty rights, licensees must submit their review to the CNSC, together with their licence application. In the alternative, the review could be submitted as a "project description if an environmental assessment (EA) decision under CEAA 2012 is being sought prior to a licensing decision."⁴⁶¹

Licensees are charged with the duty to carry out research to identify potentially affected Aboriginal groups and decide the scope of engagement required for every identified Aboriginal group. To achieve this, the licensees, among other factors, will consider: "historic or modern treaties in the region of the regulated facility" and "potential impacts to the health and safety of the public, the environment and any potential or established Aboriginal and/or treaty rights and related interests."⁴⁶²

The identified Aboriginal groups are provided with the preliminary information by the licensees, stating the extent of the planned activity on the licence application, the possible impacts and mitigation measures. Licensees are required to submit Aboriginal engagement report to the CNSC, which shall contain a detailed plan of proposed engagement process.⁴⁶³ Pursuant to the

⁴⁵⁸ See generally, REGDOC-3.2.2, *supra* note 441.

⁴⁵⁹ *Ibid* at 4.

⁴⁶⁰ *Ibid*.

⁴⁶¹ *Ibid* at 5.

⁴⁶² *Ibid*.

⁴⁶³ *Ibid* at 8.

engagement report, licensees will submit information collected to the CNSC.⁴⁶⁴ The information therein will help the CNSC to “ensure an adequate Aboriginal consultation process, to determine the appropriate level of Aboriginal consultation activities, and to carry out an effective and efficient EA and/or licensing review.”⁴⁶⁵

Licensees are also required to keep record of every Aboriginal engagement activities to help follow-up on relevant issues or concerns identified, including measures adopted to minimize impacts or to consider issues. Relevant information may include:

- i. meeting details
- ii. information specific to the activity described in the licence application that has been provided to Aboriginal groups
- iii. any issues that have been raised [relating] to adverse effects on the potential or established Aboriginal and/or treaty rights and related interests of the Aboriginal groups
- iv. any mitigation measures proposed by either Aboriginal groups or the proponent that address potential adverse impacts on Aboriginal and/or treaty rights and related interests.

Following a receipt of an Aboriginal engagement report, the CNSC will revert to licensees, and may request that licensees furnish further information or clarifications. In its role to determine whether licensee activities will require Aboriginal consultation as well as the level of consultation, the CNSC will carry out a “preliminary” duty to consult.⁴⁶⁶ Primarily at the preliminary stage, the CNSC identifies and creates a list of potentially affected Aboriginal groups regarding the license application, including additional Aboriginal peoples identified by the CNSC. Where the CNSC decides that proposed activities will require consultation, the identified Aboriginal peoples are notified with the relevant information, including the proposed activities, potential impact relating to the activities, and the scope of consultation. After an Environmental Assessment or Licensing Decision, the CNSC may require the licensees to ensure that adverse effects from the activity be “avoided, mitigated or addressed through offset measures.”⁴⁶⁷ The CNSC may also require a follow-up regarding licensees’ Aboriginal engagement.

⁴⁶⁴ *Ibid* at 7.

⁴⁶⁵ *Ibid*.

⁴⁶⁶ *Ibid* at 9.

⁴⁶⁷ *Ibid* at 10.

Furthermore, identified Aboriginal groups are encouraged to participate in public hearings regarding the issuing of licences. The hearing process creates an opportunity for Aboriginal peoples to present before the CNSC tribunal the nature and the scope of potentially affected Aboriginal interests, including “outstanding issues and concerns [throughout] the regulatory process, and to learn about any proposed accommodation measures by the licensee.”⁴⁶⁸

While the CNSC is responsible for discharging the duty to consult, the procedural aspects of consultation are largely delegated to the licensee.⁴⁶⁹ The CNSC considers licensees as “best positioned to collect information and propose any appropriate additional measures.”⁴⁷⁰ The CNSC may rely on the information gathered by the licensee and the proposed measures to prevent or mitigate or offset potential adverse impacts.⁴⁷¹ Delegation to the licensee may likely incentivize disproportionate submission from proponents. For example, proponents may attempt “to cast [...] a very positive light [on] past engagement efforts” with Aboriginal groups, trying to avoid fundamental costs.⁴⁷² In the hearing concerning an AREVA application, a request for a process and funding for the Aboriginal groups to carry out fundamental due diligence and assessment of the proponent’s renewal application led to the abrupt ending of a meeting. Unfortunately, this may have been as a result of the disagreement between Aboriginal groups and the proponent as it appears that the proponent told the Chief of Buffalo River “that she was threatening AREVA with a request and if she wanted to challenge the application at the hearing or beyond she was free to do so, and that AREVA would be successful as they have been [...] in the past and they would continue to be successful in the future”⁴⁷³

The CNSC’s REGDOC-3.2.2, suggests that the CNSC could deny a license application as a result of insufficient consultation. However, there is no suggestion that the CNSC has ever rejected an application on account of insufficient consultation.⁴⁷⁴ For instance, at the CNSC public hearing for the renewal and amendment of CNL’s Nuclear Research and Test Establishment Operating Licence (NRTEOL) for Chalk River Laboratories (CRL) which is close

⁴⁶⁸ CNSC, Codification of Current Practice, *supra* note 394 at 1-3.

⁴⁶⁹ REGDOC-3.2.2, *supra* note 441 at 1.

⁴⁷⁰ *Ibid.*

⁴⁷¹ *Ibid.*

⁴⁷² Canadian Nuclear Safety Commission Public Hearing Transcript, June 7th, 2017, Kikinahk Friendship Centre, La Ronge, Saskatchewan at 178, online: CNSC <<http://nuclearsafety.gc.ca/eng/the-commission/pdf/2017-06-07-HearingCorrected.pdf>> (Accessed November 9, 2018).

⁴⁷³ *Ibid.*

⁴⁷⁴ See generally, Omoruyi Conference paper, *supra* note 103

to Chalk River, Ontario, there was no Aboriginal participation.⁴⁷⁵ Despite Aboriginal non-participation, the CNSC approved the applications. In addition, the CNSC approved the operating licence notwithstanding that it found that CNL needs to “improve its proactive disclosure processes” which in itself was an allusion to the absence of full disclosure.⁴⁷⁶ By this decision, CNSC suggested that it sometimes applies a minimalist standard in fulfilling Aboriginal consultation.

Furthermore, in *Athabasca Regional Government*,⁴⁷⁷ the proponent’s application for the renewal of its operating licence for a period of eight years was successful. The affected Aboriginal groups brought applications to the court contending among other points that their concerns regarding Aboriginal or treaty rights were not addressed. The notice for the pending application was not given and the *Athabasca Regional Government*’s effort to get all adequate information before the hearing was not possible as the information was provided during and after the day of the hearing. The Aboriginal groups also contended that questions they raised at various meetings were not addressed. The court rejected the First Nations’ application to set aside the proponent’s licence, despite the serious issues raised on grounds for the application.⁴⁷⁸ Despite Aboriginal peoples’ contention that consultation was not adequate, and that no effort as to reconciliation was made, the court found that the CNSC did not err in its decision with respect to the duty to consult.⁴⁷⁹

⁴⁷⁵ See generally, CNSC Public Hearing Transcript, April 6th, 2016, Ottawa, Ontario, online: CNSC <<http://nuclearsafety.gc.ca/eng/the-commission/pdf/2016-04-06%20-%20Hearing%20Corrected.pdf>>

⁴⁷⁶ CNSC, Record of Decision: In the Matter of Applicant Canadian Nuclear Laboratories Limited, Application to Renew and to Amend the Nuclear Research and Test Establishment Operating Licence for Chalk River Laboratories, decision of April 6, 2016 at paras. 184, 185, online: <<http://nuclearsafety.gc.ca/eng/the-commission/pdf/Record%20of%20Decision%20-%20CNL%20-%20Chalk%20River%20Laboratories.pdf>>.

⁴⁷⁷ *Athabasca Regional Government v. Canada (Attorney General)*, 2010 FC 948.

⁴⁷⁸ *Ibid* at para 70.

⁴⁷⁹ *Ibid*.